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MICHAEL RODAK, JR.,

# In the Supreme Court of the United States

No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, et al.,
*Intervenors.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# In the Supreme Court of the United States

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**No.** .....

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FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,
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and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, et al.,
*Intervenors.*

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*To the Honorable, the Chief Justice and Associate Justices:*

Petition is hereby made for the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit. The questions here involved overlap the *Gissel* card majority bargaining order issues now pending before you in *Linden Lumber Division, Summer & Co.* v. *National Labor Relations Board, cert. granted* 42 U.S.L.W. 3594 (April 16, 1974) (No. 73-1231).

## OPINIONS BELOW

The Eighth Circuit opinion is reported at 496 F. 2d 813. The National Labor Relations Board opinion is at 203 NLRB No. 145. Neither the oral opinion of the District Court of Iowa on the conviction of the Union nor the civil judgment against the Union in the Southern District of Iowa has been officially reported.

## JURISDICTION

The judgment of the United States Court of Appeals was entered July 2, 1974. Review jurisdiction of this Court arises concurrently under 28 U.S.C. §1254, and 29 U.S.C. §§160(e), (f).

## QUESTIONS PRESENTED

1. Whether a compulsory bargaining order is appropriate under *Gissel* in the absence of evidence of an adverse effect of the employers' unfair labor practices on the fairness of an election.

2. Whether the Board should compel bargaining with a union convicted of organizing coercion.

3. Whether an employer defending charges of unfair labor practices is denied due process by excluding its proffer of evidence of countervailing unfair labor practices of the Union.

## STATUTES INVOLVED

29 U.S.C. §157. *Right of Employees as to Organization, Collective Bargaining, etc.*

29 U.S.C. §158. *Unfair Labor Practices.*

29 U.S.C. §159. *Representatives and Elections—Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer.*

29 U.S.C. §160. *Prevention of Unfair Labor Practices —Powers of Board Generally.*

Applicable sections of these statutes are printed in the Appendix (A1-3).[1]

## STATEMENT OF THE CASE

The employer-petitioners are two corporations located in Madrid, Iowa. Federal fills medical prescriptions by mail under contract with national veteran and other organizations and the smaller Drivex operates a contract mailing service in a building across the street, principally for a Massey-Ferguson Co. Federal and Drivex are owned and managed by the same three men and no objection was made to their being treated as a unit for collective bargaining purposes.

Federal and Drivex employ locally available housewives and school girls, full and part time, paying only Fair

1. "A" references are to pages of the appendix bound herewith. "JA" references are to pages of the printed Joint Appendix filed in the Court of Appeals and refiled here as part of the record under Rule 21(a).

Labor Standards Act minimums for actual hours worked. As to the size of the operation, company records show 66 non-professionals employed at the end of the first quarter of 1970, and 75 for the same date in 1971 (A79).

The intervenor Union started its organization campaign at a meeting on March 9, 1971, where 36 cards were signed and on March 12 it demanded recognition by the employers as representing "a large majority of your employees" (JA117). The cards claimed were not offered for examination. The employers proposed and Union applied for, a statutory election to determine the question of representation (JA118). On April 2, 1971, following receipt of the first quarter's results, the employers let 10 employees go, nine from Federal, one from Drivex. Nine of the ten were signers of union cards.

On April 5, the ten terminees, joined by 25 other employees, went on strike. On April 20, the union and the employer stipulated for a "Certification Upon Consent Election" (JA2-3) which excluded the ten terminees and seven names withdrawn by the employers before agreement, and listed 65 employees as agreed unit voters.

On April 8, the employers were granted an injunction by the Iowa District Court against picket line violence (A10). During April and early May strike incidents occurred of mass picketing, pushing, name calling, threats, spikes, slashed tires, broken windows, car following, an apparent shooting, and a coincident incendiary device in a non-striker's trailer home. On May 8 contempt charges were filed by the employers, and, on June 1, the Union, its president, other organizers brought into Madrid by the Union, and four strikers, were convicted (A13).

The Board election was held on May 13. Fifty-seven employees voted without challenge, 25 for the Union and

32 against Union representation (JA4). Twenty-three additional ballots were challenged.[2] The Union moved to set the election aside and both the Union and employers cross-filed unfair labor practice charges alleged to have affected the election outcome.

The employers' charges of §8(b) violations were dismissed by General Counsel of the Board on the Union's consent to post a notice to refrain from any repetition and the employers' application to consolidate the charges by both sides for hearing was accordingly denied. The representation case was joined with the Union's unfair labor charges for a single hearing.

At the hearing the employers unsuccessfully argued economic necessity for their dismissal of 10 employees on April 2, stating they had returned to the 1970 employment level under the compulsion of operating losses sustained in the opening quarter of 1971.[3] The employers also asserted that the ten employees released were junior as measured by departmental seniority and separate employment at

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2. The Administrative Law Judge held (A36),

> The election which was conducted on May 13, 1971, resulted in 35 votes cast for the [Union] and 32 votes cast against the [Union]. Twenty-three ballots were challenged, a sufficient number to affect the result of the election.

The official record of the vote is as given above. Since it does not seem to be merely a clerical error and the ten votes are obviously critical to the outcome, petitioners assume that the examiner must have counted the ten terminees twice, both as voting for the Union and as being among the challenges

3. *Federal*
(findings, A77-79)

| | Sales | Income | Employees |
|---|---|---|---|
| Jan-Mar 1970 | $383,000 | $240,000 [240.00 ?] | 66 |
| Jan-Mar 1971 | $416,000 | ($15,000) | 75 |

Federal and Drivex. The employers' proffered evidence on offsetting Union misconduct, which was rejected except as to incidents relevant to voter qualification (A107-09).

The Administrative Law Judge set aside the stipulated voting list, (A88-90), upheld 12 challenges which reduced the unit size to 63 (A97), and sustained 10 of the 21 complaint charges against the employers, finding violations of §§8(a)(1), (3), and (5)[4] of the Act.

The §8(a)(1) unfair labor practices occurred in March before and after the appearance of the Union and, to the extent sustained by the Board and Court of Appeals, are detailed in Part I of the Circuit opinion, A8 to 10. These comprise an improper interrogation, two cases of unlawful surveillance of meetings, changing the duties and hours of four employees, an undue limitation on union solicitation in the plant, an implied promise of benefit, and a threat of dismissal of two employees for taking sales information out of the plant.

As to the validity of the April 2 discharges, the examiner held that the two companies were to be treated for employee seniority as a single pay unit and a plant-wide measure should have been used rather than departmental selection of the terminees (A76-84). While conceding that the employer had shown an economic basis for the dismissals, he concluded that on the whole evidence he would find the terminations were intended to be used by the employers as "a show of power" (A84) and therefore constituted a violation of §8(a)(3). The facts are discussed in the Circuit opinion at A10 to 13.

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4. Not charged in the complaint (JA9-18) but held to follow from the §8(a)(3) violation (A37).

The May 13 election result was set aside, the challenged ballots were ordered to be left sealed, and the examiner, stating that a fair rerun election would be impossible, recommended a Gissel bargaining order (A106-07).

Two members of the National Labor Relations Board panel generally adopted the Administrative Law Judge's recommendations, enlarging the unit by two and altering three rulings on challenges. The Board denied the employers' request to be heard on their claim of deprivation of due process in the exclusion of their evidence of Union unfair labor practices.

Chairman Miller dissented from his fellow members, concluding that the record showed the employers had demonstrated adequate economic reasons for the release of the 10 employees on April 2, and concluding that the sustained §8(a)(1) violations were not a sufficient basis for a compulsory bargaining order under *Gissel* guidelines (A31).

On review in the Eighth Circuit, Judges Stephenson and Lay deleted three strikers from reinstatement rights because of the Iowa conviction. With that exception, they directed enforcement of the Board's order, including the provision for compulsory bargaining (A14-15).

Judge Van Oosterhout dissented, concurring with Chairman Miller of the NLRB that the employer had shown adequate economic reasons for the release of the ten employees and that in any event compulsory bargaining was not justified under *Gissel* principles (A16).

Prior to the issuance of the Circuit opinion, the employers instituted an action for the damage caused by the Union and strikers and judgment in the amount of $18,851.95 was granted on a jury verdict by the Southern District of Iowa (A117).

## REASONS FOR GRANTING THE WRIT

### 1

### The Decision Below Is in Conflict with Gissel

Given a choice before this Court, the employers would of course agree with Chairman Miller and Judge Van Oosterhout that the release of ten girls on April 2, 1971 was an essential, or at least a reasonable business response to first quarter losses. And if this had been the decision, there could have been no serious claim below that any employer impropriety adversely affected the outcome of the May 13 election and the result of that election would have closed the question.

But that was not the decision. Panel majorities control the holdings of the Board and the Circuit in the same way that majority sentiment should govern employee selection of a bargaining representative under the Labor Management Relations Act. The question here is whether in an ambiguous situation like the present, you have held that the Act authorizes the issuance of a compulsory bargaining order in lieu of a statutory election without necessary recourse to a finding of reasonable relation between the unlawful practices and the election process.

In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), you distinguished between the statutory purpose of the Act and the means used to measure employee sentiment in any given case. You held that the secret election, although a preferred method, was not the only permitted means of ascertaining a majority opinion, that in determining whether a refusal to bargain existed under Section 8(a)(5), the Board could use alternative methods if a fair election had been made impossible, 395 U.S. at 613-16. You found that

such an alternative existed in the evidence of Union card majorities which were on the facts of those cases a sufficiently trustworthy indication of employee preference. You required the Board in each case where an election was avoided in favor of a bargaining order, to state the reasons why the preferred election was rendered ineffective by the unlawful practices shown in the record, 395 U.S. at 620.

Did *Gissel* intend that the required finding of relationship could be satisfied by a formula conclusion to that effect by the Board, the sort of omnibus statement that the Fifth and Sixth Circuits have called "a litany, reciting conclusions by rote without factual explication", *N.L.R.B.* v. *American Cable Systems, Inc.*, 427 F. 2d 446, 449, *cert. den.* 400 U.S. 957 (1970); *N.L.R.B.* v. *East Side Shopper, Inc.*, 498 F. 2d 1334, 1336 (6 Cir. 1974)? The Circuits have mostly said "No", exemplified by the *American Cable* conflict with the Board as described in *N.L.R.B.* v. *Gibson Products Co. of Washington Par., La., Inc.*, 494 F. 2d 762 (5 Cir. 1974). The Courts of Appeals have read *Gissel* to require an affirmative Board explanation of the claimed relation,

> The Court in *Gissel* thus placed bargaining orders based on a card majority in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice.
>
> *N.L.R.B.* v. *American Cable Systems, Inc., supra*, 427 F. 2d at 448.

This difference of view between the Board and the Circuits has led to repeated reversals of Board bargaining orders, e.g.,

D.C. Circuit: *N.L.R.B.* v. *Ship Shape Maintenance Co.*, 474 F. 2d 434 (D.C. Cir. 1972).

Second Circuit: *N.L.R.B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (2 Cir. 1971), *after remand* 472 F. 2d 170 (1972); *N.L.R.B.* v. *World Carpets of New York, Inc.*, (hereinafter *World Carpets I*) 403 F. 2d 408, *after remand* 463 F. 2d 57 (hereinafter *World Carpets II*) (2 Cir. 1972); *N.L.R.B.* v. *M. H. Brown Co.*, 441 F. 2d 839 (2 Cir. 1971); *N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (2 Cir. 1968).

Third Circuit: *N.L.R.B.* v. *Easton Packing Company*, 416 F. 2d 256 (3 Cir. 1969); *Krystyniak* v. *N.L.R.B.*, 415 F. 2d 125 (3 Cir. 1969).

Fourth Circuit: *Louisberg Sportswear Co.* v. *N.L.R.B.*, 462 F. 2d 380 (4 Cir. 1972); *N.L.R.B.* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F. 2d 11 (4 Cir. 1971).

Fifth Circuit: *N.L.R.B.* v. *Gibson Products Co. of Washington Par., La., Inc.*, 421 F. 2d 156 (5 Cir. 1969), *after remand* 494 F. 2d 762 (1974); *Daisy's Originals, Inc. of Miami* v. *N.L.R.B.*, 468 F. 2d 493 (5 Cir. 1972); *N.L.R.B.* v. *American Cable Systems, Inc.*, 414 F. 2d 661 (5 Cir. 1969), *after remand* 427 F. 2d 446, *cert. den.* 400 U.S. 957 (1970); *N.L.R.B.* v. *Li'L General Stores, Inc.*, 422 F. 2d 571 (5 Cir. 1970).

Sixth Circuit: *Automated Business Systems* v. *N.L.R.B.*, 497 F. 2d 262 (6 Cir. 1974); *N.L.R.B.* v. *East Side Shopper, Inc.*, 498 F. 2d 1334 (6 Cir. 1974).

Seventh Circuit: *Peerless of America, Inc.* v. *N.L.R.B.*, 484 F. 2d 1108 (7 Cir. 1973); *New Alaska Development*

*Corp.* v. *N.L.R.B.*, 441 F. 2d 491 (7 Cir. 1971); *Ingress-Plastene, Inc.* v. *N.L.R.B.*, 430 F. 2d 542 (7 Cir. 1970); *L. C. Cassidy & Son, Inc.* v. *N.L.R.B.*, 415 F. 2d 1358 (7 Cir. 1969).

Eighth Circuit: *Dawson Metal Products, Inc.* v. *N.L.R.B.*, 450 F. 2d 47 (8 Cir. 1971); *N.L.R.B.* v. *Hart Beverage Co.*, 445 F. 2d 415 (8 Cir. 1971); *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (8 Cir. 1971); *N.L.R.B.* v. *Blades Manufacturing Corp.*, 344 F. 2d 998 (8 Cir. 1965).

Ninth Circuit: *Thiem Industries, Inc.* v. *N.L.R.B.*, 489 F. 2d 788 (9 Cir. 1973); *N.L.R.B.* v. *Coca-Cola Bottling Co. of San Mateo*, 472 F. 2d 140 (9 Cir. 1972); *Mechanical Specialties Company* v. *N.L.R.B.*, 414 F. 2d 898 (9 Cir. 1969).

Tenth Circuit: *Cannady* v. *N.L.R.B.*, 466 F. 2d 583 (10 Cir. 1972); *N.L.R.B.* v. *Miller Trucking Service, Inc.*, 445 F. 2d 927 (10 Cir. 1971).

*Cf.* Foss and Kobdish, *Gissel Packing and Bargaining Orders or "A Funny Thing Happened on the Way to the Election"*, 41 GEO. WASH. L. REV. 44 (1972); Perl, *The NLRB and Bargaining Orders: Does a New Era Begin with Gissel*, 15 VILL. L. REV. 106 (1970); Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering from a Landmark*, 46 ST. JOHN'S L. REV. 193 (1971).

One way a Court of Appeals may avoid such conflict and consequent delay is to substitute automatic approval of Board orders for the "whole record" review standard of §10(e) and (f) of the Act whenever the record is silent and bargaining orders are to be enforced. A principal proponent of this doctrine is the Eighth Circuit as illustrated by its classic restatement of the *Gissel* guidelines in *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940, 945 (1971),

(1) . . .

(2) Where the record is silent concerning the actual impact of the employer's unfair labor practices, we defer to the Board's exercise of discretion and grant enforcement.

Does the Board's *Gissel* interpretation coupled with this *Arbie* rule create a situation of compulsory selection of a bargaining representative by less than a majority? We think the present case shows that it does.

There were 36 Union cards signed in early March. None thereafter, even before April 2. One card signer resigned and left Madrid. 35 girls went on strike. There were 10 terminees and 25 votes on May 13 for the Union, again a maximum of 35, if all terminees are assumed to have voted Union. Three strikers were disqualified by the Court of Appeals for violence preceding the strike, i.e. 32. There were 32 votes against the Union, even allowing all 12 challenges sustained by the Administrative Law Judge. The Board admitted an additional three who presumably (the votes are still sealed) had voted against the Union, a total of 35. On the face of the record it is statistically evident that not one person changed their vote between March 15 (the card-counting date) and the election two months later, neither by reason of the acts of the employers nor of the Union.

The essence of *Gissel* is that a majority must have once existed in favor of a Union and be shown to have been destroyed thereafter by acts of the employers. Here the record demonstrates that every Union card eventuated in a Union vote and it is therefore impossible to state any rational basis for showing that any acts of these employers prevented the election of May 13 from being a fair one, or made it impossible to hold a fair rerun election.

To the extent that this Court did not authorize minority labor representation in *Gissel*, the Board's order and the Eighth Circuit *Arbie* rule are in conflict with your decision. The holding of the Administrative Law Judge effectively described the method used to avoid determination of employee sentiment:

> Inasmuch as the alternatives set forth above provide either that the Union win the election, in which case Respondent must bargain with it, or that the election be set aside, and the bargaining order issued, it is my recommendation that in order to save time, too much of which has already been spent on this matter, the challenged ballots should not be counted, but the election should be set aside, without further ado, and the bargaining order issued . . . . While it is true that a certification provides certain benefits to the Union, I believe that in this case, an order to bargain will provide benefits exceeding those which the Union would gain by achieving certification through the election process. Accordingly, I shall recommend that the election be set aside, the petition for election be dismissed and that a bargaining order issue (A106-07).

## II

## Should the Clean Hands Doctrine Restrict the Board's Choice of an Employee Bargaining Representative?

The Act makes it

> [A]n unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 . . . . [self-organization]
>
> 29 U.S.C. §158(b)(1)

and there can be no dispute with the asserted enforcement policy of the Board as stated in *Gissel*,

> A bargaining order will not issue of course, if the union obtained the cards through . . . coercion . . . .
>
> 395 U.S. at 592

which accords with the equitable nature of the injunctive forms of relief provided by 29 U.S.C. §160.

However, it does seem to be a fact that bargaining orders have been and presumably will continue to be, issued in situations where coercive union membership pressure is unrebutted, e.g. *World Carpets II*, and *United Mineral, supra*. And, if so, the bargaining order remedy is being granted under circumstances which in normal course would bar any petitioner from recourse to equity and therefore any appellate affirmance constitutes a departure from the usual course of judicial procedure.

In *Gissel* there was a discussion on card reliability in misrepresentation situations, (e.g. "you have to sign a card to be allowed to vote") but the only reference to direct voting coercion was the quotation of the Board policy as stated above. In distinction to *Gissel* the coercion issue does arise in this case. Although the Circuit denied enforcement of the Board's order to reinstate three strikers because they were convicted of using violence in recruiting, it nevertheless accepted the Board's discretion to require bargaining with a union which stood in exactly the same posture—both the District Court jury and the Iowa court having found that the criticized acts of the strikers were encouraged by and participated in by the Union. This result conflicts with holdings in other Circuits.

As early as 1939 you held that participation in coercive organization would disqualify striking employees from the

Act's remedy of job reinstatement, *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The correlative question of disqualifying the offending union from the card majority type of recognition was considered in *N.L.R.B.* v. *United Mineral & Chemical Corp., supra,* where it was held:

> It is exceedingly hard to believe that Congress meant to authorize the Board to require bargaining with a Union having a bare card count majority which has attempted to increase this or to enforce its claim to representation by hitting other employees or the employer on the head.
>
> 391 F. 2d at 841.

The same Circuit refused enforcement of a bargaining order in *World Carpets I,* upholding an employer's refusal to recognize a union holding 4 cards out of 5 employees. The Court's ruling was based on its uncertainty of whether union coercion had played a part in securing the cards. The case was remanded to require the Board to hear the employer's charges and to consider whether the union should be disqualified, and if not, whether a bargaining order was an appropriate substitute for an election and in what way it would further the policies of the Act.

> "[A] bargaining order is 'strong medicine' whose 'potentially adverse effect on the employees' §7 rights must not be overlooked'."
>
> Quoting *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74, 78 (2 Cir. 1965), 403 F. 2d at 412.
>
> [T]he Board should not automatically issue a bargaining order in every [card majority] case without considering whether the policies of the Act will be effectuated thereby. *Id.*

On remand, in *World Carpets I*, the Board heard the employer's evidence of Union violence. but, again with Chairman Miller dissenting, it reinstated its earlier direction for compulsory bargaining, viewing the union misconduct as inconsequential.

In the present case, this *World Carpets I* decision of the Board (188 NLRB No. 10) was accepted by the Administrative Law Judge as being a "decision which rules this" and on that basis dismissed the argument made by these petitioners that misconduct by this Union should disqualify it as a compulsory representative of petitioners' employees (A108-09).

However, this selection of a controlling precedent by the examiner was ill-timed. The *World Carpets* employer brought his case back to the Second Circuit, which for a second time refused to enforce the Board's reinstated order to bargain, 463 F. 2d 57 (1972). Judge Friendly pointed out that the Board had again failed to give any explanation of the manner in which the employer's violations as found had made it impossible to hold a valid election. Citing recent comments which noted the Board's view of *Gissel* as generally adopting card count bargaining orders, 463 F. 2d at 62 n. 6, he added that in order to justify a bargaining order, even employer violations which could reasonably be shown to have prejudiced the reliability of a statutory election had to be weighed against the corresponding background of union misconduct.

Moreover, the facts in the present case go well beyond *World Carpets I* and *II*. Here a state court conviction of this Union for the use of violent methods of employee persuasion had preceded the hearing which led to the affirmed recommendation for compulsory bargaining. In the face of that decision the ruling eliminating the statutory election in favor of compelled bargaining with this Union could

only be intended as a punitive response to the findings of unfair labor practices against the employers. But a punitive order is not within Board powers,

> [The Act] did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order . . . .
>
> . . . There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.
>
> *Fansteel, supra,* 306 U.S. at 257-58.

It is petitioners' argument that the policy of the Act can only be effectuated by disqualifying any union from becoming an employee representative in any campaign where violence in organizing has been used. Any lesser compromise by the courts would necessarily lead unions to considering the calculated risk of using employee coercion in any given instance—particularly since there would be a high probability that many such cases would never be brought to court by employers for the sake of securing industrial peace.

Petitioners concede of course that the solution which they now suggest is neither directed nor forbidden by the words of the statute or specifically in terms by any court. Petitioners, however, say it is an implied remedy under the statute for acts defined as unlawful, and the immediacy of the situation is becoming a more common feature of labor organizing, *United Const. Wkrs., etc.* v. *Laburnum Const. Corp.,* 347 U.S. 656 (1954); *United Auto Workers,*

*etc.* v. *Wisconsin Emp. Rel. Bd.*, 351 U.S. 266 (1956); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957); *Int'l Union [Auto Workers] etc.* v. *Russell*, 356 U.S. 634 (1958). In fact, review of labor tort opinions even suggests the possibility that certain unions may generally encourage such conduct as a matter of policy to create the kind of reputation which in itself would be of considerable value in securing employee cards in new campaigns, *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (6 Cir.), *cert. den.* 359 U.S. 1013 (1959); *White Oak Coal Co.* v. *United Mine Workers*, 318 F. 2d 591 (6 Cir. 1963), *cert. den.* 375 U.S. 966, *reh. den.* 379 U.S. 871 (1964); *Flame Coal Co.* v. *United Mine Workers*, 303 F. 2d 39 (6 Cir.), *cert. den.* 371 U.S. 891 (1962); *Price* v. *United Mine Workers*, 336 F. 2d 771 (6 Cir. 1964), *cert. den.* 380 U.S. 913 (1965); *Gilchrist* v. *United Mine Workers*, 290 F. 2d 36 (6 Cir.), *cert. den.* 368 U.S. 875 (1961). The intervening Union here, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its predecessor, the United Packinghouse Workers, while not on a par with the Mine Workers on the judicial record, have at least achieved something of a reputation in this field, *United Packinghouse, etc. and Samuel W. Berry*, 153 NLRB 956 (1965); *Amalgamated Meatcutters, etc. and Davis Wholesale Co., Inc.*, 165 NLRB 264 (1967); *N.L.R.B.* v. *U.P.W. of A.*, 274 F. 2d 816 (5 Cir. 1960), *affirming* 123 NLRB 464 (1959); *Wilson Packing Co.*, New York Times, Dec. 10, 1959, at 33, Col. 1; Dec. 11, 1959 at 20, Col. 1; Jan. 8, 1960 at 12, Col. 1; *Iowa Beef Packers*, New York Times, Mar. 17, 1965, at 32, Col. 4; Dec. 17, 1969 at 37, Col. 5; Apr. 12, 1970, at 56, Col. 3; *Western Iowa Pork Co.*, New York Times, Apr. 10, 1965, at 15, Col. 6; *Coercion of Employers*, New York Times, Aug. 2, 1967, at 42, Col. 1; Apr. 17, 1969 at 39, Col. 2; Washington Post, October 17, 1971, at 1, Col. 5.

Declaring the extent to which this type of situation defeats national labor policy and shaping the means whereby it can be corrected constitutes an important question of Federal law which has not been, but should be settled by this Court.

> No opinion of the Supreme Court of the United States has recognized the right of a labor organization to use violent means to accomplish the lawful ends of plant organization. *Meadow Creek, supra,* 263 F. 2d at 63.

But equally, no opinion of this Court has attached terms to the use of organizing violence which would make it unprofitable to the unions concerned.

## III

## Were the Employers Deprived of Administrative Due Process in the Refusal to Hear Jointly the Cross-Charges of Employers and Union?

The Act requires that in any Board hearing of an unfair labor practice charge, the proceedings shall be conducted "in accordance with the Rules of evidence applicable in the district courts of the United States . . ." 29 U.S.C. §160(b). Proof of union coercion has been held to be relevant to the determination of a majority representative, *N.L.R.B.* v. *United Mineral & Chemical Corp., supra, Fansteel Metallurgical, supra, N.L.R.B.* v. *Dallas City Packing Co.*, 230 F. 2d 708 (5 Cir. 1956), accord, *World Carpets I and II, N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 300 F. 2d 671 (4 Cir. 1962).

Under the statute a party's right to produce evidence shall not be limited, *Winchester Spinning Corp.* v. *N.L.R.B.*, 402 F. 2d 299 (4 Cir. 1968); *N.L.R.B.* v. *Indiana & Michigan Electric*, 318 U.S. 9 (1943) and therefore a full hearing of

the employer in a representation case is a due process requirement, *N.L.R.B.* v. *G. K. Turner Associates*, 457 F. 2d 484 (9 Cir. 1972); *N.L.R.B.* v. *Janler Plastic Mold Corp.*, 82 LRRM 2174 (7 Cir. 1972); *N.L.R.B.* v. *Millard Metal*, 472 F. 2d 647 (1 Cir. 1973); *Luminator Division of Gulton Industries, Inc.* v. *N.L.R.B.*, 469 F. 2d 1371 (5 Cir. 1972).

In *N.L.R.B.* v. *Ortronix, Inc.*, 380 F. 2d 737 (5 Cir. 1967), the Court said

> In our view there exist numerous substantial and material issues of fact—there is head-on clash between the company and Union allegations of irregularity in the two elections—which call for a formal hearing and the failure of the Board to provide one was a denial of procedural due process. See *United States Rubber Company* v. *N.L.R.B.*, 5 Cir., 1967, 373 F. 2d 606 . . . . On review of the Board's findings, we have discretion to require that the Board not shut off a party's right to produce evidence or conduct cross-examination material to the issues, as well as to see that a party's rights are not finally foreclosed until his case has been fairly heard.
>
> 380 F. 2d at 740-41.

In *Trade Winds Co.* v. *N.L.R.B.*, 413 F. 2d 1213 (5 Cir. 1969), *reh. den.* 424 F. 2d 549 (1970), the Fifth Circuit denied enforcement to a Board bargaining order for failure to hear the company's charges.

> The Company contends that these facts make out at least a prima facie case that there was "such serious threats of physical violence and coercive conduct that 'an atmosphere of fear and reprisal existed and [rendered] * * * a free election * * * impossible.'" *Shoreline Enterprises of America, Inc.* v. *N.L.R.B.*, 5 Cir., 1959, 262 F. 2d 933, 942 . . . .

> ". . . Viewed cumulatively, we have no doubt that the employer's objections charge that the election was conducted in less than the laboratory conditions so often promised by the Board and required by the Courts. We are also of the opinion that substantial and material factual issues exist which make it necessary that the employer be given a hearing and an opportunity to establish his charges * * *"
>
> Quoting *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241, 244 (5 Cir. 1967), 413 F. 2d at 1215.

By contrast in the present case, the employers' §8(b) charges against the Union starting with the state court conviction (18-CB-425) were dismissed by the Board's General Counsel on the Union's agreement to post a notice not to engage in such conduct in the future. On that basis, consolidation of hearings on the cross-charges of the employers and Union was then refused. The same proof was then offered by petitioners on the hearing of the §8(a) charges against them and excluded as irrelevant (JA223, 230, 858).

Petitioners sought review by the Board, arguing that this was a denial of due process. An oral hearing was refused (A20), and the issue was otherwise left unmentioned in the Board's decision. The due process claim was again raised by petitioners as Part IV of their brief to the Eighth Circuit. The Court of Appeals appeared to be at least aware of the background,

> These followings occurred in light of an atmosphere of other acts of terrorism on the part of Union adherents. (A13)

but made no reference to the petitioners' claim of due process denial for the exclusion of its evidence of such terrorism.

As the cited cases hold, union violence is relevant to the question of union certification. The exclusion of proof of this point violated the hearing requirements of the Act and denied petitioners due process. In ignoring this, the Court below departed from the usual course of judicial procedure and should be reversed.

## CONCLUSION AND PRAYER

The Court below has misinterpreted this Court's ruling in *Gissel* and has, by its enforcement of a compulsory bargaining order under these circumstances, defeated the employee determination policy of the Act.

Moreover, this particular Union should, by reason of the violence it used to organize this plant, be disqualified to represent these employees under the implied employee freedom from coercion which the Act guarantees in the selection of a bargaining representative.

Finally, the Court below denied these petitioners due process of law in failing to hold that the refusal to hear the employers' charges against the Union was in derogation of the right given by the Act to submit evidence under the rules of evidence applicable in District Courts.

Petitioners therefore pray this Court for the issuance of a writ of certiorari to review the decision below and upon such review to remand the case to the Eighth Circuit to modify its judgment to such degree as may be appropriate to disqualify this Union and ascertain the true choice

of these employees by an uncoerced secret election under the Act.

Respectfully submitted,

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# APPENDIX

## STATUTES INVOLVED

29 USC § 157. *Right of Employees as to Organization, Collective Bargaining, Etc.*

Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. [Sec. 7]

29 USC § 158. *Unfair Labor Practices.*

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; [Sec. 8(a) (1)]

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . [Sec. 8(a) (3)]

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. [Sec. 8(a)(5)]

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title. . . . [Sec. 8(b)(1)]

29 USC § 159. *Representatives and Elections—Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer.*

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . . [Sec. 9(a)]

. . . .

(e) (1) Upon the filing with the board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer. [Sec. 9(e)]

29 USC § 160. *Prevention of Unfair Labor Practices—Powers of Board Generally.*

(e) The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. [Sec. 10(e)]

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. [Sec. 10(f)]

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101
Robert C. Tucker, Clerk

July 2, 1974

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Re: No. 73-1362 & 73-1420. Fed. Prescription Ser., et al
v. NLRB.

Dear Sirs:

Enclosed herewith to each of you is copy of certified copy of judgment of this Court entered today in the above case.

Very truly yours,

Robert C. Tucker,
Clerk

eh
enc.

By /s/ W. F. Grueninger
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 73-1362

---

Federal Prescription Service, Inc., and Drivex Co.,
Petitioners,

v.

National Labor Relations Board,
Respondent,

and

Amalgamated Meat Cutters and Butcher Workmen of
North America, AFL-CIO, et al.,
Intervenors.

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No. 73-1420

---

Amalgamated Meat Cutters and Butcher Workmen of
North America, AFL-CIO, et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

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**ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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Submitted: January 14, 1974.
Filed: May 1, 1974

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Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges

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STEPHENSON, Circuit Judge.

These consolidated appeals are before the court upon the several petitions of Federal Prescription Service, Inc., and Drivex Company (Employer) and Amalgamated Meat Cutters and Butcher Workmen of North America (Union) pursuant to 29 *U.S.C.* § 160, seeking review of an order issued against Employer on May 31, 1973, 203 N.L.R.B. No. 145, and upon the National Labor Relations Board's cross-application to enforce the order.

The Board found in agreement with its trial examiner[1] that Employer violated § 8(a)(1) of the National Labor Relations Act by coercively interrogating its employees, interfering with employee meetings, threatening its employees with discharge, discriminatorily changing work rules, and promising benefits as an inducement to abandon support of the Union; that Employer violated §§ 8(a)(3) and (1) of the Act by discharging ten employees in order to discourage pro-Union activities; and that it violated §§ 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Board concluded that Employer's violations "not only precluded a fair election, but were of such a pervasive and aggravated character. . . that an order directing the Company to bargain with the Union [was] necessary to repair the unlawful effects." *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918 (1959).

The Board's order directed the Employer to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their protected rights guaranteed under § 7 of the Act. Additionally it directed Employer to offer the discriminatees full and immediate reinstatement and to make them whole for any loss of pay

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1. Affirmed by a 2 to 1 vote (Chairman Miller dissenting).

suffered by reason of the discrimination, and to post customary notices.

Federal Prescription Service, Inc., is a national mail order drug prescription business. Drivex Company is also a mail order drug firm and a mailing service operation. Federal Vitamin Service is a national mail order vitamin business directed principally to individuals. The work for each company is conducted by the same group of employees, the companies operate out of a single plant facility located in Madrid, Iowa, and the companies share common ownership. Craig Sandahl is the principal stockholder and president of each company. T. R. Rasmusen is a minor stockholder and officer of both Federal Prescription and Federal Vitamin Service, and Richard Johann is a minor stockholder and officer of all three companies. The Employer's work force is made up primarily of housewives and schoolgirls. Regular employees are paid $1.60 per hour and are given no paid holidays or sick leave.

In early March, 1971, a Union organizational campaign commenced at Employer's plant. Upon learning of the attempted organizational effort, Employer attempted to attend unionization meetings, changed working hours and conditions of several Union adherents, declined to recognize the Union without an election when requested by letter to do so, and ultimately discharged several employees prior to the election. This in turn triggered a strike and mass picketing of Employer's operation, and caused a temporary restraining order against mass picketing to be issued by a state court. Thereafter an election was held the results of which were not certified because of Union objections. These objections were consolidated for hearing with unfair labor practice charges.

For the reasons hereinafter stated we grant enforcement of the Board's order in part.

## I. § 8(a)(1) VIOLATIONS

With respect to the § 8(a)(1) violations, we find that there is substantial evidence upon this record as a whole to support the Board's determination. *See, Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456 (1951).

On March 3, 1971, an employee petition was circulated and signed by nearly the entire work force demanding higher wages and better working conditions. Upon learning of the petition, Employer's president, Sandahl, called employee Betty Peterson into his office and interrogated her in the presence of other supervisory personnel as to the petition's purpose and the identity of the participants. The record discloses that the nature of the inquiry led to evasive answers on the part of employee Peterson. We have previously held such interrogations to be unlawful. *See e.g., N.L.R.B.* v. *Midwest Hanger Co. & Liberty Eng. Corp.*, 474 F.2d 1155, 1161 (8th Cir. 1973).

Following this incident, Sandahl called an employees meeting to discuss their complaints. Dissatisfied with Sandahl's responses, approximately 35 to 40 employees gathered after hours on March 5 to discuss contacting a union representative. Sandahl likewise attempted to attend this meeting and suggested that the employees return to the plant and further discuss their complaints.

The initial meeting with an international representative of the Union was held on March 9. Again Sandahl made an uninvited appearance, this time with Richard Johann, an officer of Employer Corporation. Sandahl attempted to explain his presence by indicating that he understood he was attending an open meeting, and that the employees' questions would most likely not be answered unless he were present. Sandahl and Johann left at the insistence of the Union representative. After their de-

parture 34 or 35 employees signed cards designating the Union as their collective bargaining representative.

In the midst of this organizational activity, several work changes were made with respect to Union adherents. Employee Terry Edwards had her desk moved closer to her supervisor so that her work habits could be more easily observed. Additionally, employees Betty Peterson, Helen McCormick and Peggy Hoover had their working hours changed in order to preclude pro-Union discussion during unsupervised non-regular company hours. Richard Johann testified that he had imposed a so-called "no-nonsense" rule which forbade employees from leaving their working stations to talk to one another. It appears from the record, however, that an employee anti-Union committee was permitted to function freely during regular working hours.

On March 15, employee Steven Hansen, Johann's son-in-law, called a meeting of six employees at which he suggested that Sandahl be given another opportunity to resolve their problems.[2] Sandahl in turn indicated that since they had gone to the Union his hands were tied, but that he felt he could provide the same benefits as fast as an outsider could. These activities were followed by instances where Richard Johann's wife elicited information from employee Diana Hamil with respect to the latter's opinion about and activities concerning the Union, and

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2. Employer contends that Hansen was not a supervisor, and therefore his comments are not attributable to management. We cannot agree. Hansen was Johann's son-in-law, he informed the employees that management had prior knowledge of the meeting, he assumed authority during the in-plant meeting to sever the telephone connection so that the meeting would not be interrupted, and he assumed authority to extend the lunch hour of those in attendance. We therefore sustain the Board's finding that Hansen's comments were attributable to management. *See, General Mercantile & Hardware Co.* v. *N.L.R.B.*, 461 F.2d 952, 955 (8th Cir. 1972).

where Mrs. Johann by implication threatened to fire employees Hoover and Peterson for giving legitimately acquired sales information to another Union company.

We find no basis upon which to reject the Board's findings in connection with these § 8(a)(1) violations. Its determination in this respect is therefore sustained.

## II. § 8(a)(3) VIOLATIONS

On April 2, 1971, ten employees were terminated. The following day a strike commenced in protest of the discharges. A petition for a temporary restraining order against mass picketing was subsequently filed by Employer in state court, and an order granting the same was issued on April 3. Thereafter, on one occasion, mass picketing occurred, principally by husbands of employees and by employees of other plants represented by the Union. On two other occasions later in April, a number of car-following incidents occurred. This ultimately led to two groups of employees being found in contempt of court.

On April 20, the parties signed a stipulation for Certification Upon Consent Election. An election was conducted on May 13, at which 23 persons who presented themselves at the polls were challenged. Thereafter, the Union filed timely objections which were consolidated for hearing with the unfair labor practice charges.

On May 25, the Union offered by mail to end the strike and requested the immediate unconditional reinstatement of the striking employees. On June 10, Employer recalled some, but not all, of the strikers. None of the strikers responded. On June 16, Employer sent letters to employees Peterson, McCormick and Edwards and informed them that because of their "serious misconduct in connection

with the strike and picketing," Employer "cannot consider continuing your employment."

The ten discharges on April 2, 1971, occurred less than two weeks after the Union filed its election petition (filed March 22) but prior to the date on which an election could be held. The discharged employees were given no prior notice that Employer was contemplating a reduction in its work force. At the time the Union requested recognition, it had a majority of employees in the bargaining unit,[3] but nine out of ten of the dischargees had signed Union authorization cards. Then subsequent to the election, pursuant to the Union's written request, Employer did not hesitate to recall several of the discharged employees.

These discharges must be considered in light of Employer's contention that it followed "departmental" rather than "plant-wide" seniority in selecting the dischargees. Employer's own hiring list [Exhibit No. 91] refutes this allegation. It shows that three discharged employees from the promotion department were senior in that department to Charlotte Simons, a known anti-Union employee who assisted management in its campaign. Similarly, two promotion dischargees were senior in that department to Steven Hansen, Johann's son-in-law. Both Simons and Hansen were retained. The Board found, however, that even if departmental seniority were followed by Employer, the discharges were nonetheless discriminatory. That is, the facts and circumstances surrounding these events render the application of departmental seniority highly suspect. For example, seniority at Federal Prescription was based upon time served in the whole company and took no account of time served in the respective departments.

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3. On March 15, the date on which the Union's demand for recognition was perfected, there were 65 employees in the bargaining unit, 36 of whom had signed Union cards.

Furthermore, Employer did not utilize seniority in traditional ways. There was no established wage or promotional program, nor were there paid holidays or sick leave based upon length of service. Parenthetically, we note that if plant-wide seniority had been utilized, only three Union adherents would have been discharged. Employer suggests that it had no knowledge of the dischargees' relationship with the Union. We are satisfied that the early attempts made by Sandahl to ascertain the names of those who signed the March 3 petition and management's attendance at Union meetings, coupled with the reporting activities of employee Simons and the supervisory activities of Mrs. Johann were, in the aggregate, sufficient to impute knowledge to Employer.

Upon this record the discharge of the ten employees can reasonably be characterized as " 'inherently destructive' of important employee rights." Such determination under *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798 (1967), would thus allow the Board to find unfair labor practices despite evidence introduced by Employer that his conduct was motivated by business considerations. *Accord, N.L.R.B.* v. *Midwest Hanger Co. & Liberty Eng. Corp., supra,* 474 F.2d 1155, 1158 (1973). Even assuming that these discharges may have been partially the result of legitimate business considerations,[4] this record is replete with evidence supporting the Board's determina-

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4. Employer contended that a declining profit margin motivated the terminations. However, the Board found Employer's reasoning to be pretextual. I.e., that sales had increased by 70% in 1970 and by more than 10% in the first quarter of 1971. Although Employer's profit margin had declined considerably in the first quarter of 1971, it was noted during oral argument and supported by the record [transcript at 994, App. 844] that part of Employer's marketing strategy and method of selling during that period was to entice new customers on a "half-price" basis, intentionally taking a loss, then develop profits on a renewed order basis.

tion that the April 2 reduction was motivated by Employer's anti-Union animus.[5] *See, McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67, 76 (8th Cir. 1969).

The question remains, however whether Employer's refusal to reinstate employees Peterson, McCormick and Edwards was justified. These three employees during the course of the strike violated the Iowa state court injunction prohibiting certain activities, were found guilty of contempt and were fined. During the strike, all three were involved in car-following incidents, in contravention of the state court's order, during which non-strikers were followed to their homes and verbally intimidated. These followings occurred in light of an atmosphere of other acts of terrorism on the part of Union adherents. With respect to employee Peterson, the administrative law judge found that Employer could properly refuse reinstatement because of a verbal threat she made about the continued safety of a son of a nonstriker. The Board disagreed and held that the remark when viewed in the context in which it was made[6] did not justify Employer's refusal of reinstatement. We cannot agree. Not every violation of a court order by striking employees justifies an employer's refusal to reinstate those employees found guilty of contempt. *See, N.L.R.B.* v. *Cambria Clay Prod. Co.*, 215 F.2d 48, 54 (6th Cir. 1954). Nevertheless, the effect of intimidation, verbal assaults and threats on the part of the three em-

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5. We note that Chairman Miller in dissenting was persuaded that the Employer terminated ten employees on April 2, 1971, for economic rather than discriminatory reasons.

6. Peterson in effect said to employee Wisecup while the latter was crossing the picket line that Wisecup's son, who worked at a neighboring meat plant represented by the Union, "just may have an accident." The Board indicated that while it did not condone the remark, it was an isolated one made on the first day of the strike at a time when feelings and emotions were at their peak.

ployees all in contravention of the clearly defined court order, manifestly provided a justifiable basis upon which to deny reinstatement. *Cf., N.L.R.B.* v. *Blades Mfgr. Corp.*, 344 F.2d 998, 1004-6 (8th Cir. 1965). We therefore hold that the failure to reinstate employees Peterson, McCormick and Edwards was not in violation of § 8(a)(3) of the Act.

## III. THE § 8(a)(5) BARGAINING ORDER

In *N.L.R.B.* v. *Gissel*, *supra*, 395 U.S. 575, 89 S.Ct. 1918 (1969), the Supreme Court stated that the Board may issue a bargaining order even where the union has never demonstrated majority support where the unfair labor practices are so "outrageous" and "persuasive" that "their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be ha ." The Court noted further that where the union at one point had a majority, the Board may appropriately enter an order upon a showing of "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." 395 U.S. 575, 613-14, 89 S.Ct. 1918, 1940.

On March 15, the date on which Employer received the Union's request for recognition, the Union held valid authorization cards signed by 36 employees of the 65 employees in the bargaining unit. The Board not only found that the Union held a clear majority, but determined that Employer's activities were of such a "pervasive and aggravated character" that a fair election was precluded and a bargaining order was necessary. This record supports that determination. The repeated interference with the employees' protected rights in violation of § 8(a)(1), and in particular the discharge of the ten employees in the face of the election justifies the Board's finding that a bargain-

ing order should issue in this instance.[7] *See, N.L.R.B.* v. *Sitton Tank Company*, 467 F.2d 1371, 1372 (1972).

## IV. ATTORNEYS' FEES AND COSTS

Finally, the Union urges that it should have been awarded legal expenses and costs arising from this litigation. Such remedial matters are within the broad discretion of the Board, *see, N.L.R.B.* v. *Gissel, supra*, 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939 (1969). Contrary to the Union's position, *see, Tiidee Products, Inc., et al.* v. *N.L.R.B.*, 194 N.L.R.B. No. 198 (1972), we cannot say based upon this record that Employer's litigation of issues was so frivolous that the Board abused its discretion by failing to make such an award. *See also, International Union of E.R.&M.W., AFL-CIO* v. *N.L.R.B.*, 426 F.2d 1243, 1248, 1253 n.15 (D.C. Cir. 1970). We therefore sustain the Board's determination in this respect.

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7. *See, Arbie Mineral Feed Co.* v. *N.L.R.B., supra*, 438 F.2d 940, 943-44 (1971), in which we noted:

> In this case, not marked by any outrageous employer conduct, we must determine whether, under the *Gissel* rules, Arbie's conduct exerted "minimal impact on the election machinery," which would obviate the need for a bargaining order, or tended to "undermine majority strength and impede the election processes," a circumstance entitling us to uphold the Board's issuance of the bargaining order. To draw the line between these two propositions is extremely difficult particularly upon appellate review conducted in the sterile atmosphere of a printed record. The *Gissel* decision offers the following guideline:
>
> > 'It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10 (c) of the Act (29 U.S.C. § 160 (c), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. [395 U.S. at 612, n. 32, 89 S.Ct. at 1939].'

Subject to modification in connection with employees Peterson, McCormick and Edwards, we grant enforcement *of the Board's order.*

VAN OOSTERHOUT, Senior Circuit Judge, Dissenting in Part.

I concur in Division I of the majority opinion and that part of Division II which holds that the employer's failure to reinstate employees Peterson, McCormick and Edwards was justified and did not constitute a § 8(a)(3) violation of the Act.

I dissent from that portion of Division II which holds that the termination of ten employees on April 2, 1971, constitutes a violation of § 8(a)(3) and from Division III of the majority opinion. I base my dissent on those issues on Board Chairman Miller's dissenting opinion. I agree with Chairman Miller's view that there is no substantial evidence on the record as a whole to support a finding that the employer terminated ten employees for discriminatory reasons rather than for economic reasons.

The principal unfair labor charge under which the Board may base its bargaining order was the termination of the ten employees. Many of the § 8(a)(1) charges were dismissed by the Board. The § 8(a)(1) charges established occurred for the most part before the agreement for the election, and the charges established were not such as would support a finding that the § 8(a)(1) violations would prevent a new and fair election. I would deny enforcement of the bargaining order and the order for reinstatement of the ten employees terminated on April 2, 1971.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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September Term, 1973

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No. 73-1362.

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Federal Prescription Service, Inc., et al., Petitioners

vs.

National Labor Relations Board, Respondent.

Amalgamated Meat Cutters and Butcher Workmen, Intervenor.

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No. 73-1420.

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Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al., Petitioners

vs.

National Labor Relations Board, Respondent.

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD**

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The Court having considered petition for rehearing en banc filed by counsel for Petitioners in case No. 73-1362 and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

For purposes of clarity, the last paragraph of the opinion is modified to read as follows:

> Subject to modification in connection with employees Peterson, McCormick and Edwards, we grant enforcement of the Board's order, including reinstatement and back pay to any April 2, 1971 dischargee not given an unconditional offer of reemployment.

June 6, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 18-CA-3199

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

Case 18-RC-8603

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.

and

LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

## DECISION AND ORDER

On April 28, 1972, Administrative Law Judge,[1] Paul E. Weil issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions, a supporting brief, and a request for oral argument; the Charging Party filed exceptions and a supporting brief; and the General Counsel filed limited exceptions. Later, the Respondent filed a brief in answer to exceptions filed by the Charging Party and the General Counsel and a motion to reject the brief of the Charging Party in support of exceptions; and the Charging Party filed a statement in opposition to Respondent's request for oral argument and a brief in opposition to Respondent's brief.

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1. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended order, as modified herein.[3]

We agree with the Administrative Law Judge that the discharge of 10 employees on April 2 violated Section 8(a)(3) and (1) of the Act. In its exceptions, Respondent asserts that it did not know who the union adherents were and that the Administrative Law Judge confused its departmental structure and misconceived the economic reasons advanced for the termination of the 10 employees.

There is substantial evidence to establish that the Respondent actively sought information about the concerted and union activity of its employees and that it was materially assisted in this search by various employees. In particular, the credible evidence reveals that Charlotte Simons attended several union meetings (including the March 9 meeting at which nine of the dischargees signed authorization cards), that she took notes on who attended,

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2. The Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 554, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

3. The request by the Respondent for oral argument is hereby denied as the record, including the briefs, adequately presents the issues and the positions of the parties.

and that she was seen entering the office of Craig Sandahl, Respondent's president, with a notepad in her hand similar to that on which she had been seen taking notes at the meeting. Further, Mildred Knox testified that she attended several union meetings and that she reported her attendance at those meetings to Richard Johann, Respondent's vice presidesnt. Given the entire record, the inference that Respondent knew who the union adherents were cannot be gainsaid.

Similarly, we are persuaded that the record evidence contradicts the Respondent's contention that the 10 employees were selected for termination on the basis of departmental seniority. In its exceptions, Respondent contends that Steve Hansen and Charlotte Simons were assigned to the U.S. Mailers Division of Drivex Co., rather than the promotion department of Federal Prescription Service, Inc., and, accordingly, that the Administrative Law Judge erred in finding that dischargee Beverly Storey was senior to both Hansen and Simons in Respondent's promotion department. As suggested by the Respondent, it would appear that the Administrative Law Judge predicated his finding on Respondent's Exhibit 91. The record reveals that this exhibit was prepared under the supervision and direction of Respondent's vice president, T. R. Rasmusen. Rasmusen testified that this exhibit was a date of hire list of the employees by department of Federal Prescription Service, Inc., on April 2, *and* that it was the list used by the Respondent to select the 10 employees to be terminated on April 2. This exhibit shows that dischargees Storey and Lois Geneser were senior to Hansen and Simons and that dischargee Doris Novy was senior to Hansen in Respondent's promotion department. Accordingly, while there is some testimony to show that Hansen and Simons worked in the U.S. Mailers Division of Drivex

Co., we find that the record evidence is insufficient to overcome the direct and uncontroverted testimony by Vice President Rasmusen that this list was used by the Respondent to select the 10 employees to be terminated on April 2.

Even assuming *arguendo* that the Respondent had selected the employees for termination on the basis of departmental seniority, we would affirm the finding by the Administrative Law Judge. The record reveals that all the employees involved in this proceeding were paid through Federal Prescription Service, Inc., and that the Respondent did not separately identify its employees by company designations on the various exhibits which it prepared and introduced. Moreover, whichever company the employees performed work for, the record reveals that the great majority of Respondent's employees appear to perform work which does not require special skills. Further, the "seniority" applied here by the Respondent was based on the date of hire of each employee and took no account of time served in a given department. Indeed, this may be explained by the fact that seniority, prior to the terminations here, appears to have been of little significance in Respondent's operation. Respondent did not utilize seniority in any of the traditional ways, in that it did not have established wage or promotion progressions, nor did it grant holidays or vacations on the basis of seniority. Thus, given the nature of the work engaged in by a majority of Respondent's employees and the fact that Respondent did not take into account the time served in a particular department, the Respondent's use of departmental seniority is highly suspect, particularly in view of the fact that *only 3 of the 10 dischargees* would have been terminated if plantwide seniority had been applied.

Finally, we have considered the Respondent's contention that the principal reason for the terminations was a

declining profit margin in 1970, followed by substantial losses in the first quarter of 1971. Conversely, Respondent does not contend that a reduction in business necessitated the terminations. On the basis of the entire record, we are not persuaded that the Respondent has adequately established the economic necessity for a cut of approximately 12.5 percent or more of its work force at a time when the record shows that sales increased by nearly 7 percent in 1970 and by more than 10 percent in the first quarter of 1971. Accordingly, as found by the Administrative Law Judge, and also for the additional reasons stated herein, we find that the record evidence establishes that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the 10 employees on April 2.

The Administrative Law Judge found that a remark made to Eve Wisecup by Betty Peterson constituted a threat to Mrs. Wisecup with regard to her son and that it was of such an aggravated nature that Mrs. Peterson may be denied reinstatement by the Respondent. Contrary to the Administrative Law Judge, we find that the Respondent's refusal to reinstate Betty Peterson was motivated by her union activity and that the remark to Mrs. Wisecup was only a pretext seized upon to obscure the real motive for Respondent's action.

According to the credited evidence, the Union's agent Danny Gettler, asked Eve Wisecup, as she was crossing the picket line on the first day of the strike, whether her son worked at another plant at which the Union represented the employees. Wisecup said, "Pardon me," and Betty Peterson said in effect, "Yes, and he just may have an accident." Assuming *arguendo* that the remark constituted a threat, the issue remains, whether the Respondent in fact discharged Mrs. Peterson for making the threat or whether Respondent seized upon the threat as a pretext

for ridding itself of one of the Union's most vigorous adherents.

The record reveals that the remark was made on April 5. Later, on May 25, the Union offered to end the strike and requested immediate unconditional reinstatement for its members. After some weeks of deliberations Respondent started sending out letters recalling some of the strikers. In a letter dated June 16, Craig W. Sandahl, Respondent's president, told Mrs. Peterson that her job had been eliminated, that Respondent did not anticipate reactivating it, and, accordingly, that Respondent could not recall her at that time. Sandahl added that because of "your serious misconduct in connection with the strike and picketing particularly, we cannot consider continuing your employment."[4]

Our reasons for finding that the refusal to reinstate Mrs. Peterson by the Respondent was discriminatorily motivated are predicated on compelling evidence in the record. The record amply establishes that the Respondent entertained a strong union animus. It is clear that Peterson was among the most prounion, if not the most prounion, of the employees in Respondent's employ. Further, there is no evidence that the Respondent made an investigation to determine if a threat was actually made to Wisecup by Peterson and the Respondent never gave Peterson any opportunity to relate her version of the incident before denying her reinstatement. Moreover, the Respondent has discriminatorily discharged and refused to

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4. Respondent used this same language in the letters it sent to employees Helen McCormick and Terry Edwards, both of whom, along with Peterson, were found guilty of contempt of court and fined $25 for participation in car-following incidents which occurred during the strike. The Administrative Law Judge found that the car-following incidents were not of such an outrageous nature that they render the three employees unfit for further employment by the Respondent. We agree.

reinstate other supporters of the Union. Finally, the Administrative Law Judge found, and the record evidence establishes, that Peterson had been a primary target of Respondent's earlier unfair labor practices, i.e.,

1. Peterson was interrogated by Sandahl on March 4 about the petition being circulated among the employees in violation of Section 8(a)(1) of the Act;

2. Peterson was present at the street corner meeting on March 5 at which time Sandahl interfered with protected concerted activities of its employees in violation of Section 8(a)(1) of the Act;

3. Peterson had her hours of work changed by Respondent on March 8 in violation of Section 8(a)(1) of the Act;

4. Peterson was the employee who first met Sandahl and Richard Johann, an officer of the Respondent, at the door of the first union meeting on March 9, and told them they should not be there, which conduct by Sandahl and Johann violated Section 8(a)(1) of the Act;

5. Peterson was one of the two employees that Mrs. Richard Johann, a supervisor, was referring to when she threatened to have two employees discharged if she could prove the employees released certain data about Respondent's business, which threat constituted a violation of Section 8(a)(1) of the Act; and

6. Peterson was the subject of the Respondent's single effort to enforce its no-nonsense rule on March 25, the disparate enforcement of which violated Section 8(a)(1) of the Act.

While we do not condone the remark made to Wisecup by Peterson, it must be viewed in the context in which it was made, as an isolated remark made on the first day of

the strike, following the discriminatory discharge of 10 employees, including 9 union adherents, when the feelings and emotions of all concerned were at their peak. Under all the circumstances here, we conclude that the Respondent's refusal to reinstate Betty Peterson was motivated by her union activity and that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

The Administrative Law Judge found that the unit consisted of 63 employees at the time the Union's demand for recognition was perfected on March 15.[5] The parties have filed exceptions to certain employees being included in or excluded from the unit by the Administrative Law Judge. Inasmuch as we find merit in certain of these exceptions, we shall revise that figure and hereby find that there were 65 employees in the unit on March 15.

Specifically, we find merit in the Union's exception relative to Gloria Rasmusen, the wife of Vice President Rasmusen, and we exclude her from the unit based on her relationship to a stockholder and one of the three primary officers of the Respondent.[6]

The Administrative Law Judge found that Raymond and Kenneth Lansing were independent contractors and excluded them from the unit. To the contrary, we find that the record evidence is insufficient to establish an independent contractor relationship between the Respondent and the Lansing brothers. Moreover, the record evi-

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5. See Appendix A of the Administrative Law Judge's Decision.

6. So too, we find that Merritt Hansen, the daughter of Vice President Johann, and Gary Rasmusen, the son of Vice President Rasmusen, both excluded from the unit as casual employees by the Administrative Law Judge, would also be excluded on the basis of their family relationship. *Caravelle Wood Products, Inc.*, 200 NLRB No. 118; *Parisoff Drive-In Market, Inc.*, 201 NLRB No. 102.

dence clearly establishes that both Raymond and Kenneth Lansing are regular part-time employees. Accordingly, we would include the Lansing brothers among the unit employees on March 15.

Finally, we find that the Administrative Law Judge inadvertently omitted employee Karen Burke when he compiled the list of unit employees. Accordingly, we have arrived at a figure of 65 employees in the unit on March 15, by deleting Gloria Rasmusen from, and adding Raymond Lansing, Kenneth Lansing, and Karen Burke to, the list of employees set forth in Appendix A of the Administrative Law Judge's Decision.

Based on the entire record, including the Respondent's conduct violative of Section 8(a)(1) of the Act before and after the filing of the petition, and particularly the Respondent's discriminatory discharge of 10 employees on April 2 and its refusal to reinstate 3 employees after the strike in violation of Section 8(a)(3) of the Act, we find that the Respondent's violations of the Act not only precluded a fair election, but were of such a pervasive and aggravated character as to warrant the finding which we now make, that an order directing the Respondent to bargain with the Union is necessary to repair the unlawful effects. The aforementioned conduct has undermined the Union's majority and caused an election to be a less reliable guide to the employee's free choice than the signed authorization cards by which they designated the Union to represent them. We find, accordingly, that, by refusing the Union's request and engaging in the aforesaid unfair labor practices, the Respondent violated Section 8(a)(5) of the Act and an order requiring the Respondent to recognize and bargain with the Union is appropriate to

remedy its violation of that section, as well as to remedy the other unfair labor practices found.[7]

### Amended Conclusions of Law

The Conclusions of Law are amended by substituting the following for paragraph 6 of the Administrative Law Judge's Decision:

"6. By discharging Judy Allen, Evelyn Burke, Geneva Battani, Lois Geneser, Marilyn Udorvich Gohn, Marjorie Huser, John McCormick, Doris Novy, Jo Ellyn Rathbun, Beverly Storey, Terry Edwards, Helen McCormick, and Betty Peterson, Respondent discouraged membership of its employees in Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its Local P-1149, by discrimination with regard to tenure of employment or terms and conditions of employment of the above-named persons."

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Federal Prescription Service, Inc., and Drivex Co., Madrid, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order, as herein modified:

1. Substitute the following for paragraph 2(b) of the recommended Order:

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7. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575.

"(b) Notify Helen L. McCormick, Terry Edwards, and Betty Peterson that they are not discharged and upon their application to return to Respondent's employ they will be employed in their former jobs or, if those jobs no longer exist, to substantially equivalent ones, without prejudice to their seniority and other rights and privileges previously enjoyed by them."

2. Substitute the attached notice for the Administrative Law Judge's notice.

Dated, Washington, D.C., May 31, 1973.

John H. Fanning, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

CHAIRMAN MILLER, dissenting in part:

Contrary to my colleagues, I am persuaded by the record as a whole that the Respondent terminated 10 employees on April 2, 1971, for economic rather than discriminatory reasons.

Federal Prescription Service, after a less than satisfactory profit year in 1970, suffered a loss in the first quarter of 1971 equal to 60 percent of its total 1970 net profit. Sales, it is true, were rising, as the majority opinion points out. But it takes little business acumen to realize that when increased sales are accompanied by red ink in the profit column, some corrective action is badly needed. The faster one increases sales at a loss, the faster one is progressing to economic suicide.

Drivex Co. was also in financial trouble, having experienced a substantial drop in net income (the Administrative Law Judge found its annual profit to have dropped to $14,000, but the record shows that the correct figure was

$4,000), and in March it was required to stop shipments to its principal customer.

Quite naturally, Respondent therefore sought areas in which indirect labor costs could be reduced. The promotion department was eliminated entirely (four employees), advertising work was eliminated in the shipping department (three employees), one employee assigned to cleaning out files was terminated, one part-time janitor was terminated, and only one direct labor employee was terminated. The latter was an employee whose work was affected by the shutoff of orders from the principal customer of Drivex.

The work eliminated in this cost saving process has never been resumed, and no employees have been hired to replace any of those who were terminated.

Selection for termination was made in departmental seniority order. (I disagree with my colleagues' analysis of the record which leads them to a contrary conclusion in this regard, and find their explanation for the Administrative Law Judge's erroneous findings rather lame.) My colleagues seem to find it odd that departmental seniority was measured by the total length of service of each employee, rather than by his or her departmental experience. Any experienced person in the industrial relations field knows that this is not unusual at all and, indeed, most collective agreements which call for an application of departmental seniority utilize precisely this kind of measurement. My colleagues also seem to prefer a plantwide seniority system. That is interesting, but in the absence of a showing that Respondent had a practice of using plantwide seniority, not very relevant.

The union activity of the terminated employees was minimal. None was a leading activist. None had solicited

other employees to join the Union or to engage in other concerted activity.

On the totality of this record, therefore, I do not believe General Counsel has met the burden of proving that the discharges were for discriminatory rather than economic reasons.

I would therefore dismiss the 8(a)(3) allegations of the complaint relating to these terminations.

The record is, however, suficient to establish violations as to Respondent's refusal to reinstate three strikers. Although the questions presented as to the seriousness of their strike misconduct appear to me to be close, I would not dissent from my colleagues' findings. Because of the closeness of this issue, however, I do not believe the refusal to reinstate them indicates a likelihood of recurrent conduct which would make a fair rerun election improbable of achievement.

The 8(a)(1) violations found by the Administrative Law Judge and my colleagues are also adequately supported by the record. They are sufficient to justify setting aside the election. But because I do not regard either the 8(a)(1) conduct or the refusal to reinstate the strikers, each of whom had engaged in some degree of undesirable conduct, to render the conduct of a new and fair election unlikely, I would rerun the election rather than enter a *Gissel* bargaining order.

Dated, Washington, D.C., May 31, 1973.

Edward B. Miller, Chairman
National Labor Relations Board

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all these things.

**WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights.**

**WE WILL NOT coercively interrogate our employees concerning their or other employees' concerted or union activities.**

**WE WILL NOT discriminate against our employees by discharging them in order to discourage activities on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, or any other Union.**

WE WILL NOT promise our employees benefits if they reject the Union or threaten them with discharge for engaging in activities on behalf of the Union.

WE WILL bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive collective-bargaining representative of our employees in the unit spelled out below:

> All full-time and regular part-time employees of Federal Prescription Service, Inc., and Drivex Co., at their Madrid, Iowa, operation, including customer correspondence, follow-up, janitor, maintenance, Massey-Ferguson office, order preparation, printing and shipping, but excluding pharmacists, all employees of Hood Hair Products, Inc., guards and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL reinstate with backpay

| | |
|---|---|
| Judy Allen | Marjorie Huser |
| Geneva Battani | John McCormick |
| Marilyn Udorvich Gohn | Doris Novy |
| Lois Geneser | Beverly Storey |
| Evelyn Burke | Jo Ellyn Rathbun |

WE WILL withdraw our action of discharge of Helen McCormick, Betty Peterson, and Terry Edwards and, on their request, reinstate them to their former

jobs or, if those jobs are no longer available, to other jobs of a like nature.

Federal Prescription Service,
Inc., and Drivex Co.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612—725—2611.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 18-CA-3199

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.
and
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

Case 18-RC-8603

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.
Employer
and
LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO
Petitioner

*George Norman, Esq.*, of Washington, D.C., and *James Miller, of* Minneapolis, Minn., for the General Counsel.

*Irving M. King, Esq.*, and *Russell Woody, Esq.*, both of Chicago, Ill., for the Charging Party-Petitioner.

*George Zaza, Esq.*, and *Robert E. Highfield, Esq., Barnes, Hickam, Pantzer and Boyd*, of Indianapolis, Ind., for Respondent-Employer.

## TRIAL EXAMINER'S DECISION

### Statement of the Case

PAUL E. WEIL, Trial Examiner: On March 22[1] the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, filed with the Regional Director for Region 18 (Minneapolis, Minn.) of the National Labor Relations Board, hereinafter called the Board, a petition seeking an election among the production and shipping employees of Federal Prescription Service, Inc., hereinafter called Respondent or Federal Prescription. On April 15 the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, the International union of which Local P-1149 is a constituent, filed a charge with the said Regional Director alleging violations of Section 8(a)(1) and (3) of the Act by Respondent by the termination of 10 employees allegedly because of their union membership and activities. On April 20, 1971, the parties to the election petition (18-RC-8603) stipulated that an election be conducted by the said Regional Director. The election which was conducted on May 13, 1971, resulted in 35 votes cast for the Petitioner and 32 votes cast against the Petitioner. Twenty-three ballots were challenged, a sufficient number to effect the results of the election. Thereafter, on May 18 the Union filed objections to the election and to conduct affecting the results of the election. On September to affect the results of the election. Thereafter, on Prescription Service, Inc., and Drivex Co. as Respondent, adding specific allegations of violations of Section 8(a)(1) of the Act and alleging the unlawful termination of three additional employees. On September 24, the Regional Di-

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1. All dates herein are in the year 1971 unless otherwise noted.

rector issued a complaint, an order consolidating the representation matter with the complaint and a notice of hearing. In the notice of hearing the Regional Director ordered that a hearing be conducted on both the challenges and the objections in the representation matter, as well as on the allegations of the complaint that Respondent had violated Section 8(a)(1) and (3) of the Act. The General Counsel in addition pleads in the complaint that the election should be set aside and the Respondent appropriately should be required to bargain collectively with the Union because of its dissipation and destruction of the Union's majority by unfair labor practices. The Respondent duly answered the complaint admitting jurisdictional facts and the status of the Union as a labor organization, but denying the commission of any unfair labor practices. Thereafter the complaint was amended and the answer of Respondent was extended to deny the additional allegations in the amendment. On the issues thus joined, the matter came on for hearing before me at Boone, Iowa, on December 7, 8 and 9, and January 11, 12, 13 and 14, 1972. All parties were represented at the hearing and had an opportunity to adduce relevant and material evidence, examine and cross-examine witnesses, argue orally on the record, and file briefs. Briefs have been received from the General Counsel, the Charging Party and the Respondent.

Upon the entire record in the case[2] and in consideration of the briefs, I make the following:

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2. The Respondent's unopposed motion to correct the transcript in 549 particulars is granted.

## Findings of Fact

### I. Business of the Employer

Federal Prescription Service, Inc., is an Iowa corporation selling drugs and related products from its principal place of business at Madrid, Iowa, by mail order.

Drivex Co. is an Iowa corporation which primarily mails film for other enterprises. Drivex has two divisions, Elmo, which is a mail order drug enterprise, and U.S. Mailers, which conducts the film mailing service. In December 1970 another corporation, Federal Vitamin Service, was organized for the purpose of establishing a national mail order vitamin sales organization. All the work of Federal Prescription Service, Inc., Drivex's U.S. Mail Orders Division, and Federal Vitamin Service is conducted by the same group of employees who appear as employees of Federal Prescription Service, Inc.[3]

Craig Sandahl is the principal stockholder and president of Federal Prescription Service, Inc., and Drivex Co. T. R. Rasmusen is a minor stockholder and officer of Federal Prescription and Federal Vitamin Service and Richard Johann is a minor stockholder of Federal Prescription Service, Inc., Federal Vitamin Service, and Drivex Co., and an officer of each. There is no other ownership of any of the enterprises. The General Counsel alleges and Respondent asserts that Federal Prescription and Drivex Co., each sell products or services respectively valued in excess of $500,000 annually, and each import into the State of Iowa from other States of the Union products valued in excess of $50,000 annually. I find that each of them is engaged in commerce within the

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3. The Elmo Company has but one employee who is paid separately.

meaning of Section 2(6) and (7) of the Act. I find also that with the exception of Elmo, all of the concerns named above comprise a common employer and constitute a single-integrated operation. Accordingly hereinafter all together are called the Respondent.

## II. The Labor Organization Involved

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its Local P-1149 are, each of them, labor organizations within the meaning of Section 2(5) of the Act.

## III. Background

The enterprises which constitute Respondent all occupy a location in Madrid, Iowa, in two buildings. In one of the buildings is located the portions of the enterprise that deal with the sales and distribution of drugs and related products. This building I shall refer to as the main building. In the other building is located the mailing service portion of the enterprise and it is called throughout the proceeding the Massey-Ferguson Building, after the name of the major client of the mailing service. In the two buildings Respondent has up to 80 employees, including supervisory and professional employees (pharmacists).[4]

Respondent's work force is made up of full- and part-time workers, apparently largely housewives and schoolgirls. Special arrangements are made to permit some of the women to work only during the winter months and remain at home during the summer school vacations. Other arrangements permit the use of students at local high

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4. The record is silent with regard to the single employee of Elmo other than such an employee existed and is paid separately.

schools and colleges to work during their school breaks and, on occasion, after school.

A group of Respondent's employees known as contract employees are paid $1.60 for each hour worked with no deductions for withholding tax, social security, or any other type of deductions. The line of demarcation between the contract employees and the regular employees is not very clear, but generally speaking, the contract employees include casual employees, such as boys hired to shovel snow, or school children who work on a very casual basis. However, some of the contract employees appear to work as regularly as many of the regular employees. With regard to that group, Respondent contends that they were paid on a contract basis in response to their own request therefor.

Most of the remaining employees, i.e., the regular employees, are also paid at the rate of $1.60 an hour, but the normal deductions from their paychecks are made by the Employer.

On March 3 two of the female employees who had become dissatisfied with their wages decided to formulate a petition asking the Respondent for increased wages, paid holidays and vacations.[5] The petition was signed by almost every employee of Respondent on March 3.

On the afternoon of March 3, Eve Wisecup, the personal secretary of President Craig Sandahl, informed him of the existence of the petition. Sandahl at this time was in his office with Richard Johann and T. R. (Moose) Rasmusen. Sandahl's immediate reaction was to call Betty Peterson, who sat outside his door, into the office and ask

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5. Respondent offered neither vacations nor any paid holidays at all. Employees are paid only for the hours worked, usually at the legal minimum wage.

her about the petition. Although she admitted signing it Peterson denied having formulated the petition or passing it around. She was dismissed from the office and returned to her job.

On March 4 in the afternoon, Sandahl called all the employees of Respondent into the meeting at which he mentioned that he knew of the petition, but had not seen it.[6] Sandahl sat on a desk in the midst of the employees and told them generally that he was not able to improve their wages at that time, but pointed out that certain improvements in the working conditions, including the installation of air-conditioning in the main building, had taken place in the preceding year. One of the girls asked him if he could not give them a raise of 5 cents an hour. He stated that under the then existing circumstances Respondent could not afford such a raise, and another girl said "how about 1 cent an hour?" His reaction to that was equally negative. The meeting continued until the end of the shift and the employees were dismissed to go home.

On the following day, March 5, the girls, who were not satisfied with the results of the meeting which had followed on the petition, agreed to meet on the street across from the plant at quitting time. There is no evidence that this meeting was anything but spontaneous. The record does not reveal how the decision to hold it came to occur, but at 4:30 p.m. when the day shift ended, from 25 to 40 employees gathered on the street across from the plant. Again Wisecup informed Sandahl that the girls were meeting across the street from the plant. Without putting his coat on, he walked out of the plant and across to the group of girls and suggested that they hold

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6. Betty Peterson by this time had possession of the petition. She took it home and left it there. It was never sent to Respondent.

their meeting inside the plant and he would be glad to talk to them about the working conditions. One of the girls apparently said that was not what they were meeting for, and the girls broke up and walked away, leaving Sandahl standing alone on the sidewalk. Before Sandahl's arrival or as they walked away from the meeting, a number of the girls decided that they would call in a labor organization for assistance. Inasmuch as the Union represents employees of other plants in the locale, it was contacted by one of the employees and a meeting was set up to be held in a public room in Madrid on March 8 in the early evening.

On March 8 Betty Peterson, together with another employee, Helen McCormick, went to the hall early to unlock it, turn on the lights and set up chairs for the meeting. They were met there by another employee Evelyn Burke and by Ben Detweiler, an International representative of the Union.

As the girls were readying the hall for the meeting, Sandahl and Johann came to the door and made as if to take off their coats. Miss Peterson went to the door and asked them what they wanted and Sandahl told her that he understood this was an open meeting for the employees of Federal Prescription, and that he proposed to attend. Betty Peterson answered that it was a meeting for the employees only, and not for the employers, and she did not think that the officers of the Company should be there. Sandahl responded that he did not think that the girls could do much discussion or have their questions answered unless he was there, and suggested that he be allowed to remain. Detweiler introduced himself to Sandahl and told him that he should not be there and was breaking the law by doing so. Either Detweiler or Peterson told

Sandahl to leave. He did so stating that he would be at the plant if the girls needed him. Johann left with him.

After the departure of Sandahl and Johann some 35 to 40 employees arrived at the meeting. At the meeting about 34 or 35 employees signed cards designating the Union as their collective-bargaining representative.

On March 10 Respondent commenced making certain changes in the employees' work. It discontinued certain of the tasks that several employees had been performing, assigned different tasks to some of them, and moved some desks from one place to another. The General Counsel contends that these changed working conditions resulted from the concerted and union activities of the employees and violates Section 8(a)(1) of the Act. In addition Respondent commenced a campaign against the union organization, holding meetings with employees, speaking with them individually, and mailing letters to all of the employees. On March 12, the Union requested recognition, claiming to represent a majority of the employees. On March 22 Respondent, by letter, declined to recognize the Union without an election. On March 22 the petition for an election was filed by the Union with the Regional Office.

On April 2 at the close of business, Respondent laid off eight employees in a group and a ninth employee, a part-time janitor, Howard McCormick. On April 3 a strike commenced; approximately 35 employees respected the picket line. Within a few days a petition for a temporary restraining order against mass picketing was filed by Respondent, and a restraining order was issued on April 8. Thereafter on one occasion mass picketing occurred, largely conducted by husbands of employees and by employees of other plants represented by the Union. There-

after on 2 separate days later in April a number of incidents of nonstriking employees being followed by either striking employees or employees of employers other than Respondent took place. A contempt hearing was held and the local court held in contempt two groups of employees, the first for the mass picketing incident, and the second, the group consisting of Danny Gettler, a business agent of the Union, Dean McCoy, Evelyn Burke, Betty Peterson, Terry Edwards and Helen McCormick, all employees of Respondent, because of the automobile-following episodes.

On April 20 the parties signed a Stipulation for Certification Upon Consent Election pursuant to which an election was to be conducted on May 13. At the April 20 meeting an eligibility list was worked out by the parties. An issue herein is whether this agreed-upon eligibility list is binding on the parties and the Board.[7] The election was conducted on May 13. In the preelection joint conference the Union indicated its awareness that an employee, whom it deemed to have left Respondent's employ, had been called in to vote. As a result of the conference at which this and other eligibility questions were raised by the parties, 23 persons who presented themselves at the polls were challenged, either by the parties or by the Board agent conducting the election. These 23 include the 9 employees laid off on April 2 and other employees challenged because of their alleged supervisory status or employee status at the time of the election.

The Union filed timely objections based on the argument that the material changes in the eligibility list and the large number of challenges caused uncertainty and confusion in the minds of employees and diluted the organizing efforts of the Union. The Union also contended

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7. See *Norris-Thermador Corporation*, 119 NLRB 1301; also *Pyper Construction Company*, 177 NLRB 707.

that the abnormal number of challenges and the situations from which they resulted created an atmosphere which precluded any attempt to conduct an election under the Board's normal laboratory conditions, and interfered with the employees' right to exercise freedom of choice.

On May 25 the Union sent Respondent a letter stating that, in view of the fact that it had filed charges alleging discrimination in the discharge of the employees on April 2, it preferred to leave the unfair labor practice issues for the Board to determine and call off the strike. The employees offered through the Union to return unconditionally to their jobs. The letter ended by calling on the Employer to inform the employees when they could come back to work. On June 10 the Employer reacted by calling some of the strikers back to work. They did not respond to the call, apparently because all of the strikers were not recalled at that time. On June 16 the Respondent sent letters to employees Betty Peterson, Helen McCormick and Terry Edwards, informing them that because of their "serious misconduct in connection with the strike and picketing," Respondent "cannot consider continuing your employment."

When the initial selection of employees did not return to work pursuant to the recall letters, Respondent recalled additional employees and worked its way through all of the strikers in this fashion. None of the strikers apparently returned to work, and the picketing has continued.

## IV. Issues

The basic issue in this whole proceeding is whether the Respondent is to be required to bargain with the Union with regard to wages, hours, and working conditions of its employees. This could follow as a result of the representation proceeding, assuming that the 23 challenged ballots

were resolved in such a way that the Union won the election, or that the objections to the election were sustained and a new election conducted, which is won by the Union. In the alternative, the General Counsel contends that the alleged unfair labor practices of the Employer, consisting of violations of Section 8(a)(1) and (3) of the Act, have rendered impossible the holding of a valid election, and that a bargaining order should issue under what has become known as the *Gissel* doctrine. (*Gissel Packing Co., Inc.*, 395 U.S. 575.)

Whether or not a bargaining order should issue in this proceeding, the following issues remain to be decided: (1) whether the nine employees laid off on April 2 are discriminatees within the meaning of Section 8(a)(3) of the Act; (2) whether the three employees whom Respondent refused to reinstate after the strike because of their conduct during the strike are the victims of discrimination under Section 8(a)(3) of the Act; and (3) whether various acts and conduct specifically alleged by the General Counsel violate Section 8(a)(1) of the Act. Ten of the 23 challenged ballots were cast by persons alleged to have been discriminated against in the instant proceeding. They were not on the eligibility list and the General Counsel contends that all parties understood that their eligibility depended on the Decision in the instant case. The remaining 13 challenged ballots could be determinative of the election, but only under the circumstances that 9 of them were cast against representation by the Union. If this were the result, of course, it would still be necessary to determine whether the election should be set aside pursuant to the objections, or the bargaining order should issue under the *Gissel* doctrine.

With regard the objections, the Union contends that not only should the stated objections be considered in de-

termining whether to set aside the election, but that if the record discloses that substantial objectionable conduct took place after the election agreement but before the completion of the election, such conduct should be considered *sua sponte* by the Board, and a determination made whether to set aside the election. In order to reach this conclusion, or in order to reach a conclusion in the alternative with regard to the *Gissel* argument, a full scale review of the alleged unfair labor practices is necessary. Accordingly, it behooves me to consider the issues herein in what would appear to be reverse order, commencing with the alleged violations of Section 8(a)(1), which in some instances may provide the key to a conclusion with regard to the alleged instances of violation of Section 8(a)(3). With this reasoning in mind, we shall proceed.

## V. The Alleged Unfair Labor Practices

### Section 8(a)(1)

When Sandahl first learned of the petition of March 3, he was in his office with Rasmusen and Johann preparing to go to lunch. Although there are as many accounts of the incident as there are witnesses, it appears that Sandahl called Betty Peterson into his office and asked her whether she signed the petition and whether she carried it around. She admitted signing the petition, but denied carrying it around or having any other thing to do with it. According to her testimony Sandahl said that if she had anything to do with it, she could put on her coat, which she interpreted to mean that she was discharged. According to the testimony of the three men, nothing of that nature was said and no threats were uttered. The General Counsel does not allege that a threat was uttered on this occasion, although he contended at the hearing that the statement was made and constituted a threat. Mrs. Peterson said that

she knew that she would be blamed for the petition and Sandahl answered that there was no blame attached, he just wanted to see the petition.

The General Counsel contends that this incident constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act. I agree. Respondent contends that the interrogation was no more than an attempt by management to ascertain what their employees' complaints were. However, employees have a protected right to engage in concerted activities, including passing around petitions with regard to their wages, hours and working conditions. This interrogation during the time the petition was being passed around and before it had been presented to Respondent could only serve to interfere with and restrain employees who were aware of it, even without the uttering of explicit threats of retaliation. The interrogation was unaccompanied by any reassurances by Respondent which might reduce the coercive impact of such interrogation. In the light of the whole record, I conclude that Respondent has violated Section 8(a)(1) by President Sandahl's interrogation of Betty Peterson.

The General Counsel contends that on or about March 4, Richard Johann and Roland Rasmusen interrogated employees in Sandahl's office concerning concerted activities protected by the Act. I am unable to determine from the transcript to what he is referring, other than possibly to their presence at the meeting of March 3 between Sandahl and Betty Peterson. Inasmuch as neither Johann nor Rasmusen said anything at this time, I shall recommend that the complaint be dismissed with regard thereto.

On March 5 when the employees attempted to meet across the street from the plant, they were immediately joined by Craig Sandahl, who had been informed by his

secretary, Eve Wisecup, of their gathering. The General Counsel contends that Sandahl's attendance at this meeting constituted interference and attempted surveillance of the meeting in violation of the Act. Again, the facts are clear; Sandahl admittedly went across to the meeting. His stated rationale was that if the girls had any questions they wanted answered, he was the logical one to answer them, so he made himself available to them. This defense does not meet the allegation. Again, employees have a right to meet and act in concert with regard to their wages, hours and working conditions. It is clear that this meeting resulted from the meeting conducted by Sandahl in the plant the day before. The girls met in order to discuss what to do next and it was at this meeting that the first impetus towards joining the Union appeared. Sandahl admittedly was aware that the girls' meeting concerned the subject of the petition. It is immaterial whether his attendance at this meeting resulted from legal naivete or a desire to restrain his employees in their concerted action. It had the effect of immediately breaking up the meeting: most of the employees in attendance departed as soon as he arrived. I do not believe that this was simply the result of a naive attempt by Sandahl to engage in a confrontation and dialogue with his employees. He had had just such confrontation and dialogue in the meeting he called himself the previous day, and it had resulted in nothing. I believe that he recognized that he could break up employee activity by his presence, and that he took this action deliberately for that purpose. Whether technically this action should be pigeonholed as a surveillance or attempted surveillance of a union meeting, or of a meeting for concerted activity, is unimportant. The fact is that by its very nature it tended to coerce employees in meeting together for their mutual concerns, and it certainly interfered with and restrained them in this regard. I find that Sandahl's action

violated Section 8(a)(1) of the Act, as alleged. I do not find any mitigation in the fact that Sandahl's first statements were that the girls could have their meeting inside the plant. This only adds to the coercive impact of his action in coming to the girls in the first place.

Again, when the employees had determined to meet with a union to explore the possibilities of representation, Sandahl was again tipped off to their activities by his secretary, Mrs. Wisecup, and again, this time with Johann, made it his business to attempt to attend the union organization meeting at the community hall. The General Counsel contends again that by presenting himself and Johann at the union meeting, and attempting to gain entrance, Respondent through Sandahl, its president, violated Section 8(a)(1) of the Act.

I agree with the General Counsel. It appears that here Sandahl was attempting for the second time to inhibit the exercise by his employees of their protected rights by presenting himself at their meeting. On this occasion Sandahl had neither the excuse that the meeting was held under his window nor that he had been invited. He had not. According to his testimony he had been informed by Mrs. Wisecup that this was "an open meeting," and accordingly he felt that he should be permitted to attend it. That it was a meeting of employees and that he had not been invited does not appear to have made any difference at all in Mr. Sandahl's mind. I conclude that by attempting to gain admission to the meeting Sandahl again demonstrated to his employees his concern over their concerted activities, and his position that only by direct confrontation with him could their concerted activities be successful. Whether in the absence of the union representative, he and Johann would have attempted to enter the hall over Mrs. Peterson's protests could not be ascertained, but to the extent

that employees were already present and saw him there, and that word of his presence at the union meeting would necessarily come to the attention of other employees, it could not fail to have coerced and restrained them in the exercise of their protected rights. Again, as in the situation of the meeting on the street, I see no point in determining whether this fits into the pigeonhole of attempted surveillance. In my opinion, it is an interference with the employees in the exercise of their protected rights and violates Section 8(a)(1) of the Act.

The General Counsel contends that by eliminating certain employees' overtime, moving them to other locations, restricting their movements to their work areas, changing their daily work hours, increasing supervision over them and taking their plant keys, Respondent interfered with, restrained, and coerced employees in the exercise of their protected concerted activities. The reference is to actions directed by Sandahl and Johann regarding the work of Betty Peterson, Peggy Hoover, Helen McCormick and Terry Edwards. A discussion of the changes requires a discussion of the situation before the changes were made.

Respondent's business is primarily a mail-order drugstore. When the mail is received, it contains orders, sometimes remittances, payments for orders, inquiries concerning the availability of drugs, the cost thereof, etc. Any customer who has ordered in the past is given a number, and all the bookkeeping is done by computer on the basis of this number. When mail is received it is initially sorted. Prior to March 8, the mail was sent to file clerks who pulled a card bearing the number for each customer's order. A new card was made for any customer who had no number, that is to say, who had not ordered theretofore. In the event the letter constituted an inquiry and was written by a person who had not been a customer in the past, so

that no card would exist, an inquiry card was made out. When a customer ordered from a price quotation, under which circumstances an inquiry card had been made, the inquiry card was pulled and a customer card typed up, and a number assigned to the customer. Normally the orders were submitted by customers on order blanks furnished them with their last order, or in the advertising through which they were first contacted. The blanks had spaces for the customer to fill in the name, the address and the computer identification number. Customers making remittances would enclose the top of their invoice, on which was printed the name, address and customer identification number. The only benefit from pulling cards in these cases was to check these numbers. According to testimony of Sandahl, he concluded that people normally would place their name, address and customer number correctly on their orders and there was no need to pull the cards, either for orders or for remittances. By the elimination of the card pulling operation, the Respondent is also enabled to eliminate the resorting and refiling operation with the same cards. Also it would permit the order readers and cash counters to start their work with the orders and remittances without waiting for the card pullers to complete their work.

Helen McCormick normally started work at 6:30 a.m. She would pick up the mail at the post office, bring it to her work place, open it, count it and pull the cards. Mrs. McCormick also frequently worked on Saturdays, doing the same work on Saturdays, picking up the mail and pulling cards so that work would be ready to proceed on Monday when the rest of the plant was in operation. On March 8 she was called into Sandahl's office where he told her that she was no longer to come in at 6:30 or to pick up the mail. She was to start at 8 a.m. and was no longer to

pull cards for cash customers. Sandahl stated that this would cut the time required at least one-third, and that there was no need for Mrs. McCormick or June Galetich, who was also a card puller, to work overtime. After March 8 Steve Hansen, Johann's son-in-law, normally picked up the mail.

The mail that contained remittances was then sent to Terry Edwards, who received the remittances and made notations necessary for the keypunch operators, so that the customer would be credited for his payment through the computer. The only change of the new system appears to be that she would no longer receive a 3- by 5-inch card with each remittance, and it would be necessary for her to take the customer number from the invoice sent in by the customer. The major part of her job was listing the remittances and preparing the notations for the keypunch operators. However, additionally, each evening she would run a tape on the checks and balance the remittance slips. This function was taken away from her and given to other girls in the office. At the same time Sandahl ordered her desk moved out of the small office in which she had been working, into the main office near the desk of her supervisor, Barbara Clemens, stating that she was to stay at her desk until it was necessary for her to leave it. She was not to do any running around and she would have better supervision there.[8]

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8. Later the same day, upset at what she considered a slight to her efficiency, Terry Edwards accosted Sandahl and asked him what was wrong with the job she was doing. During the conversation he assured her that the changes had nothing to do with the petition, but said that she was doing too much running around and the change would make it possible for her to have better supervision and to stay at her desk. There is no indication that these changes affected Mrs. Edwards' hours of work, but it clearly subjected her to closer supervision.

According to the testimony of Sandahl, changes he made with respect to the work of Betty Peterson and Peggy Hoover, who were keypunch operator and keypunch verifier respectively, resulted from the new system with regard to the cards. However, it does not appear in what regard their work would be changed other than the fact that they would not be furnished a card, but would be required to pick up the customer number from the original document. The testimony of Sandahl was that "we could conceivably get a customer with a wrong account, this always is a problem to us. We thought . . . there might be some of this and I discussed these changes with them so they would be aware of what was coming through." However, in addition to discussing the changes with them which apparently do not constitute any real change in their work, Sandahl told Mrs. Peterson and Mrs. Hoover, who prior thereto had been working hours of their own choice, starting usually between 6:30 and 7:30 in the morning, and working until they were through in the evening, that thereafter they were not to start work before 8 in the morning and they were to leave by 4:30. Sandahl denies telling Hoover and Peterson that they were not to work overtime. I do not credit his denial. It is clear that all of the girls in that section, which was supervised by Barbara Clemens, were informed that they were to work no more overtime. While Sandahl's testimony was that the girls had a certain amount of work to do and it was necessary that they stay until it was completed every day, and work Saturdays, if necessary, it is equally clear that they were informed that it was expected that their work would be completed during the hours 8 to 4:30 daily. Sandahl supported his denial that he had cut off the overtime of Peterson and Hoover with the statement that they frequently left as early as 2:30 in the afternoon when their work was completed, and that on many occasions when he wished to

confer with them in the late afternoon, they were unavailable to him. Accordingly, the change was made for his benefit. The only example of the necessity for this change appears to be one instance where a new program was instituted with regard to the business of Federal Vitamin Service a month or so before the changes were made. Even with regard to this Sandahl did not testify that he was unable to consult with Mrs. Hoover; he gave this as an example of his occasional need to consult with her. Inasmuch as the changes in the card pulling procedure, which appear to be the only real changes made, had a minimal effect on the work of Peterson and Hoover, I find that Respondent's reliance on that as a casual factor in changing their hours and conditions, does not ring true.

It is notable that when Mrs. Peterson came into the plant several days later at an hour earlier than 8 a.m., in order to do some personal work, without clocking in, she was told by Johann, after he had ascertained from other girls to whom she had spoken that she had not mentioned the union, that she was not to come into the plant before her starting time of 8 o'clock. This appears inconsistent with Sandahl's explanation that the change in her starting time was for his benefit, so that she would be there during the late part of the day, when he might want to consult with her. It is also inconsistent with the representation of Sandahl that part of the reason for the change of working hours was that it was bad policy to have employees in the plant before the normal starting time because of the fact that there were drugs on the premises, and authorities looked with disfavor on permitting employees to work there in the absence of management or of pharmacists. Clearly the girls to whom Mrs. Peterson spoke on that occasion were working, with the approval of management.

There is no basis on the record for finding that Respondent was aware of any participation by the five girls immediately affected by the changes in the matters concerning the petition, with the exception of Peterson, whom Sandahl immediately and correctly judged to be involved in the matter. It is suspicious that the five affected employees included the two who formulated the language and drew the petition up, Helen McCormick and Terry Edwards, but there is no direct evidence that the Respondent knew this when the changes were made. The basic change, i.e., the cessation of the card pulling for purposes of comparison, appears to be a valid exercise of Respondent's business judgment. I conclude that the evidence does not prevail that the procedural changes in the office work were attributable to the concerted activity of the employees. However, I believe and conclude that Respondent, having determined to go ahead with the procedural changes, used them additionally to tighten up its office procedures to prevent the employees who were most likely to have been involved in the unrest from circulating freely among the fellow employees. This is consistent with Respondent's action with regard to the meetings and with regard to Betty Peterson when it first discovered the existence of the petition. Sandahl appears to have a penchant for attempting to stamp out the brush fire of employee dissent, whenever it appears, as rapidly as possible. There is no reasonable explanation for the move of Terry Edwards to a position directly under the eye of Barbara Clemens, her supervisor, nor of the change in hours of Peterson and Hoover, who could not so readily be physically moved, but could be more closely supervised if they were required to coincide their hours with that of Sandahl, whose desk overlooked their workplace. I credit the testimony that part of the rationale for the changes was to afford greater supervision to Edwards, Peterson and Hoover. I find,

therefore, that the changes with regard to these persons were made for the purpose of interfering with their concerted activities, theretofore carried on on company time without complaint by the Employer. I do not find, however, that Peterson and Hoover lost overtime as a result of the changes or worked fewer hours. Peterson testified on cross-examination that the only weeks after the change in which she had fewer than 40 hours were 2 weeks in which she had taken time off for her own concerns, and there is no evidence by which I can compare and determine whether any lessening of overtime was accomplished, since I have no evidence that any given amount of overtime was worked before or after the changes were made. I find that by moving Terry Edwards and by changing the hours of Peterson and Hoover Respondent violated Section 8(a)(1) of the Act. This conclusion is buttressed by other actions taken by Respondent. For instance, recovering from Peterson and Hoover the keys to the plant, which they had carried over a period of years, changing the locks, telling them to stay closer to their work and not move around so much.

General Counsel contends that at the March 4 meeting Sandahl urged his employees to reject the Union, with threats of reprisal or promises of benefit. The testimony with regard to the March 4 meeting was that, in effect, Sandahl called the employees together and let them know that he had heard about the petition and had not seen it, and advised them that at that time Respondent was financially incapable of raising their wages or improving their conditions farther than it had. In the same speech Sandahl stated that in the future as conditions improved, changes would continue to be made as they had in the past. Betty Peterson testified that Sandahl, in the speech, made reference to "outsiders" in terms of warning employees that it would not do them any good to get outsiders involved

in the matter. There is no corroboration for this and it is denied by Sandahl. I believe that Mrs. Peterson confused statements made at a later meeting with the meeting of March 4, and that no such statements were made by Sandahl at that time. The General Counsel alleges that at the meeting Sandahl urged the employees to reject the Union. There was no union involved, nor had Sandahl any reason to believe that there was a union involved at that time. It was not until March 5 or 6 that employees first conceived the idea of organizing. Accordingly, I find that the proof fails with regard to that meeting.

On March 10, after the initial union meeting at which Sandahl and Johann sought admission, Sandahl again called the employees together and addressed them.

This meeting was called late in the afternoon. It was very short. Sandahl in effect told the employees that he was aware of their union organizing but he didn't want any name calling or other activity on company time. He warned the employees that they were to spend company time doing company work and said that it was too bad that outsiders were being called in, that the employees had been one big happy family until a couple of weeks before and they should stay that way and that he felt that the employees and the management could work out their problems among themselves without the intercession of an outsider. As appears to have been normal throughout this matter, Sandahl never referred to the Union by name or as a union but simply referred to them as "the outsiders." The General Counsel finds threats of reprisal and promises of benefit in this speech. The only evidence in support of this allegation is evidence that Sandahl stated, in effect, that things were run informally in Respondent's concern but that if the Union came in and working conditions were reduced to contractual terms that they would be more

formalized and restrictive. I do not believe that this constitutes a threat of reprisal within the Board's normal usage of that term. Sandahl did not suggest that changes of that nature would be unilaterally imposed by management but rather that they would result from the collective-bargaining process which is not necessarily invalid. I find no threats of reprisal or promises of benefit in this meeting and I shall recommend that the complaint be dismissed insofar as Respondent is alleged to have violated Section 8(a)(1) of the Act in this incident.

On or about March 15 the six employees in the Massey-Ferguson Building were called together by Steve Hansen for a meeting at about 11:15 in the morning. One of the girls pointed out that the luncheon break was at 11:45 and suggested that the meeting be held at a later time. Hansen answered that whenever the meeting was over the girls could take their normal 30 minutes and it would be all right. When the meeting started, Hansen told one of the employees to remove the phone from the hook because he did not want to be disturbed and she did so. Hansen commenced the meeting by stating that he had not been put up to holding a meeting although Johann knew that he was doing so. He stated that it was done on his own because he had thought a lot about it, apparently referring to the union situation, over the weekend and wanted to call a meeting. The gist of Hansen's remarks was that, because the employees had gone to a union, management's hands were tied and they could not do anything for the employees. Hansen pleaded with the girls to give Sandahl another chance to remedy their working conditions; that Sandahl needed more time to come up with an acceptable plan; and that, if they gave him another chance and he did not satisfy them with another plan, they could always call in the Union at a later time. Hansen closed with the suggestion

that one of the girls should go over to the main building and get Sandahl and Johann and bring them over to the Massey-Ferguson Building to talk to the girls. There was some apparent reluctance among the girls to go. Each of them said that they were not afraid to go but none of them went. Hansen stated that he preferred that one of the girls go get Johann and Sandahl. By this time it was about noon and Hansen suggested that they take their lunch-break and after lunch get Sandahl and Johann to speak to the girls. After lunch, no one made any move until late afternoon, each girl apparently waiting for someone else to start something. Nothing happened and again Hansen suggested that someone should go. The girls declined to go. Finally Charlotte Simons said that she would go and did so; Sandahl and Johann came back with Simons and they met with the girls at 4 o'clock. The meeting lasted until well after normal quitting time and the girls were paid overtime for their attendance. At this phase of the meeting, Sandahl apparently also asked the girls for more time to work something out for them and told them that he could not make them any offers because his hands were tied because they had brought in the Union. Various questions were asked by the girls, one asking how it happened that he was unable to give the employees a raise but that he was always able to give a raise when the Government raised the minimum wages. Sandahl answered that business normally picked up when the minimum wage was raised. Another girl asked if the employees dropped the Union would they have to sit and wait for him to work out a schedule of wage raises and benefits. Sandahl answered that he was already working on it and had been since the first meeting after the petition although he didn't know what was in the petition. The same girl asked what was happening to the profits from the Massey-Ferguson operation. Sandahl answered that they didn't actually have

much profit and quoted the sum of $4,000 to which the girl commented that that must have been used for overtime for one of the girls' salaries.

The General Counsel contends that the events recited above constitute two violations of Section 8(a)(1), one by Steve Hansen and one by Sandahl. The Respondents contend that Hansen is not a supervisor and that nothing he said was binding upon them. Hansen did not testify in the hearing. The record reveals that Hansen is the son-in-law of Richard Johann, one of the owners of the establishment. He was employed there while in school on a part-time basis and then went into the service. Since his return from the service, he has been a full-time employee in the Massey-Ferguson Building. He is not named as a supervisor, and there is no evidence of his having exercised supervisory authority other than the events that took place with regard to the meeting on March 15. He does not punch a timeclock. His normal duties include picking up the mail in the morning, the job formally [sic] done by Mrs. McCormick, and operating a bag-sealing machine in the Massey-Ferguson Building as well as doing various other jobs in that building. While he apparently acts occasionally as a conduit of orders from management located in the main building, there is no evidence of any occasion on which he originated any orders other than to tell employees what jobs were next to be done on some occasions. He is not a supervisor, nevertheless, I conclude that Respondent is responsible for Hansen's statements in the meeting. His family relationship was well known to all of the employees who reasonably attributed his statements to his father-in-law and to management, although he made a point of stating that they had not instructed him to make these statements and that he was acting on his own. Nevertheless, he pointed out that they knew that he was holding

the meeting. His assumption of the authority to cut off the phone connection of the Massey-Ferguson Building and to permit the change in the girls' normal lunch hour created the impression among the employees that he was speaking with the authority of management. In addition, the fact that he was on salary and did not punch a time-clock[9] and the fact that he mirrored the Employer's anti-union attitude, taking the same position that Sandahl had taken in the prior meeting, attended by the same girls, and going further and urging them to reject the Union in order to give Respondent an additional chance to satisfy their demands, all lead to the presumption that he was acting as a spokesman for management and that the employees would reasonably expect this to be the fact. I find that his statements are attributable to management and that by promising, in effect, that the employees' expectations would be fulfilled if they rejected the Union and gave Sandahl a chance to deal directly with them, Respondent, through Hansen, interfered with, restrained and coerced employees in their union organizational attempt in violation of Section 8(a)(1) of the Act.

With regard to the second part of the meeting at which Sandahl spoke, the statements he made are generally unexceptionable, except when viewed against the background of the statements made by Hansen at noontime. Hansen told the employees that management knew that he was calling the meeting, and I believe it is a fair presumption that management knew what he was going to say. When Hansen told the employees to give Sandahl another chance, that he would work out the pay raises and other benefits that they were seeking, and this was followed by Sandahl telling the employees that his hands were tied, that he

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9. An employee testified that Hansen so informed her; he was not called as a witness, and her testimony is credited.

could promise them nothing, but that they would be better off without the Union, it takes somewhat less than a blind leap of faith for the employees to conclude that Sandahl's message was that, given a situation where he was not faced with union organization, he would see to it that the employees' desires were satisfied. I conclude that Sandahl's speech, against the background of Hansen's, constituted a promise of benefit to the employees if they dropped the union organizational attempt, and thus violated Section 8(a)(1) of the Act.

Richard Johann is the vice president of each of the corporations that comprise Respondent. His wife, Luelle, who is known in the plant as "Cooter," described herself as personal service manager in charge of customer communication, and stated that she had six girls working under her supervision. The Johann's have a daughter Gretchen. It appears that Gretchen Johann was an occasional guest in the home of Lois Geneser, one of the employees in the plant. According to the testimony of employee Angelina Gibbons, on or about March 22, Mrs. Johann angrily accused Mrs. Geneser of untruthfully stating that the Johanns had told Gretchen not to visit the Geneser household because of the labor problem. Mrs. Gibbons stated that Mrs. Johann said that she did not discuss labor problems with Gretchen.

Mrs. Johann testified that she had been told by another employee that Mrs. Geneser had stated that Mrs. Johann had forbidden Gretchen to go to the Geneser home, that she told Mrs. Geneser that she was tired of lies and that she had never forbidden any of the children to go to the Geneser home. She further stated that she had told Mrs. Geneser that Gretchen had been told that if subjects regarding the office came up, she probably should leave, and

that the Johanns did not discuss problems with their children.

The General Counsel contends that the above incident constitutes restraint and coercion of employees concerning their concerted activities. Neither version of the incident appears violative to me. I see no threat or promise, nor other type of coercion in the incident. I credit Mrs. Gibbons that Mrs. Sandahl couched her angry remarks in terms of union activities. There is no evidence as to what, in fact, Gretchen Johann was told. That is lost in the mists of hearsay, and at any rate is irrelevant. But for Mrs. Johann to tell an employee that she had not ordered her daughter to leave the employee's home if the Union was mentioned and that she had not discussed the Union with her daughter, appears noncoercive to me. I recommend that the complaint be dismissed with regard to this allegation.

Mrs. Johann was apparently in the habit of talking in a friendly manner to the women in the plant, both those whom she supervised directly and others. When the union organization appeared, she talked about it to a considerable extent with various employees, three of whom appeared and testified concerning these conversations. Diana Hamil, whose husband was a union steward in another employer's plant, was apparently particularly the beneficiary of Mrs. Johann's conversation with regard to the Union. Mrs. Hamil testified that she had discussions with Mrs. Johann practically every day, both on coffeebreaks and during working hours, that Mrs. Johann asked her if she attended union meetings and discussed various points brought up at the union meetings, mentioning different employees who had attended the meetings, and giving her opinion as to the efficacy of this and other unions.

On one occasion Mrs. Johann was upset because it had been reported to her that the Union was going to ask for a wage rate of $3.25 an hour, as well as other costly benefits. She stated, according to Mrs. Hamil, that if the employees got that much money, the Company could not afford to keep them and their jobs would be eliminated, and that Mildred Hoover's job would be eliminated, and Mrs. Hamil's mother, Imogene Seemann, would have to do her own research. On another occasion Mrs. Johann pointed out that one way the Union had of achieving its goals was to call a strike, and the girls might have to go out on strike. Mrs. Hamil answered that if that were the case she would naturally go out. On another occasion after the business of the Employer had been discussed at a union meeting, Mrs. Johann was furious that the Union had been talking with apparent knowledge of the extent of Respondent's business, and according to Mrs. Hamil, stated that she knew what girls had taken the information out, and if she could prove it, she would have them fired. As Mrs. Hamil put it, "well, naturally, you know, if you worked there, you knew the two girls she was talking about." On another occasion Mrs. Johann talked about the reputation of the Union for violent action, and stated that she was afraid of the Union, did not like it, and she could not understand why the girls picked this Union when there were others that would more normally be interested in representing office employees. Mrs. Johann stated that she was afraid for her mother, who lived in Florida, to pay a visit because of the possibility of violence, and that she was afraid for her husband's heart condition. Mrs. Johann stated that while Sandhal could afford to lose a lot of money without being hurt, the Johanns did not have that much money and it could break them.

Mrs. Hamil stated that in her opinion Mrs. Johann spoke to her in this fashion because Mrs. Hamil had not made up her mind whether a union would be beneficial to her at the time. When she finally decided to sign a card Mrs. Hamil told Mrs. Johann that she had done so.

Mrs. Johann testified that she had conversations with Diana Hamil but never asked her whether she attended a union meeting or about other girls attending union meetings. She further testified that she "didn't have the faintest idea" who attended union meetings. She testified that she talked to Mrs. Hamil about unions because her husband had been a union steward and she was curious and she recalled asking her how union stewards got their jobs. She testified she couldn't recall whether Mrs. Hamil ever told her that she'd signed a union card. With regard to the conversation having to do with demands that she understood the Union would make, she testified that the morning after the second union meeting the entire plant was discussing the union meeting and several people stopped her and told her that the women had been told that they were going to take over the plant and that Sandahl and Johann would have nothing to do with it. The Union would decide what they would get and Sandahl would have to take it. She testified that she was very upset by being told these things and that specific demands would include paid vacations, holidays and sick leave for everyone and $3.25 an hour. She testified that she told Mrs. Hamil she did not believe this because her understanding was the Union wouldn't take any more from the Company than the Company could afford and that demands of this nature would wreck a small company. She testified also that she said that the Union and management would sit down and decide and would negotiate what the Union got. She denied she said that there would be a cutback in

employment if the Union got higher wages or that she told Mrs. Hamil that her job would be eliminated.

Mrs. Johann also testified that she had a conversation with Mrs. Hamil and another conversation with Mrs. Huser and that Mrs. Huser might have overheard the conversation with Mrs. Hamil in which she said that the thing she hated about the organizational attempt and the confusion and unhappiness and angriness in the office was the fact that, no matter who won, somebody was going to be hurt. She thought unions might be of help to the Company but she was frightened of the Amalgamated Meat Cutters because of their alleged reputation for violence and didn't see why the girls couldn't have gotten a clerical union. She denied stating anything with regard to Marjorie Huser, either that she knew that she was in the Union or that she thought Mrs. Huser would not be there until the end of April. Generally, Mrs. Johann testified that she never talked to any employee other than Mrs. Hamil on the subject of unions although she admitted that Shirley Walter talked to her about unions.

Mrs. Imogene Seemann, who is Mrs. Hamil's mother, testified that she was present during some of the conversations between Mrs. Johann and Mrs. Hamil and generally corroborated Mrs. Hamil's testimony. She testified also that she had told Mrs. Johann that she had signed a union card because she liked Mrs. Johann and wanted her to know. Mrs. Majorie Huser testified that she had a number of conversations with Mrs. Johann concerning the Union but she recalled the content of none of them except that Mrs. Johann frequently stated in effect, "You girls are going to be sorry, someone's going to be hurt."

I credit Mrs. Hamil and Mrs. Seemann that they each told Mrs. Johann that they had signed union cards. Ac-

cordingly, I discredit Mrs. Johann's denial of that fact. I credit Mrs. Huser's testimony that Mrs. Johann told her that she didn't blame Mrs. Huser for wanting more money because Mrs. Huser had lost her husband and had a family and I believe that this was said in the context of Mrs. Huser's activities on behalf of the Union which were known to Mrs. Johann. Accordingly, I discredit Mrs. Johann's denial that she knew of the union proclivities of any employee. I discredit Mrs. Johann's statement that she didn't have the faintest idea who attended union meetings. Her testimony that a number of girls reported the incidents that took place at each of the union meetings to her is completely inconsistent with her denial of knowledge. I conclude that Mrs. Johann chose to deny any knowledge of union activity when such activity was not done in her presence. With regard to the conversations with Mrs. Hamil, I find that they amounted to no less than a persistent cross-examination of Mrs. Hamil, both as to her own feelings with regard to the Union and as to the matters under discussion in the plant with regard to the Union. That Mrs. Johann and Mrs. Hamil were friendly, as Mrs. Johann testified she was with all of the girls in the plant, does not change the picture. Obviously, Mrs. Hamil, being undecided at the time about the Union but having stated this fact to Mrs. Johann, was a person whose vote could possibly be swayed by Mrs. Johann's arguments. It is difficult to see that, if Mrs. Johann, as she testified, did not believe that the women would take over the plant, more than double their wages and get paid holidays, vacations and sick leave, it is difficult to see why Mrs. Johann was so extremely upset that she was unable to contain her fear and anger as she testified. I think rather than expressing her fear and anger she was expressing her best interests in trying to convince Mrs. Hamil, Mrs. Seemann

and the other girls to whom she spoke with the fact that the Company could not afford to pay the type of wages that Mrs. Johann stated that the girls were talking about.[10]

The General Counsel contends that Mrs. Johann interrogated employees concerning their signing union cards, attendance at union meetings and other concerted activities protected by the Act. I find that Mrs. Johann engaged in interrogation of at least Mrs. Hamil and Mrs. Seemann although possibly not by direct questions. I believe that she led the conversation to union subjects deliberately in an attempt to find out all she could about the union activities taking place at the plant. I find, therefore, that Respondent violated the Act by Mrs. Johann's interrogation, which was certainly unaccompanied by any assurances to the employees to whom she spoke.[11]

The General Counsel contends that Mrs. Johann threatened employees that Respondent would go out of business if the Union came in. I recommend that this allegation be dismissed. The evidence reveals that, in fact, what Mrs. Johann stated was that if the Union could achieve benefits such as paid vacations, paid holidays, paid sick benefits and $3.25 base pay, that the Company could not afford it and would have to close its doors. I do not believe that this constitutes a threat within the meaning of the Act and I recommend that the complaint with regard thereto be dismissed.

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10. There is no evidence that the $3.25 basic wage referred to by Mrs. Johann was ever in fact discussed at a union meeting. I have no doubt that paid vacations and holidays, none of which were offered by the Respondent, and sick benefits, which were not offered by the Respondent, were the subject of discussions at union meetings. They would normally be, I'm sure.

11. Although Respondent denied generally that Mrs. Johann was a supervisor, it admitted that she occasionally performed supervisory functions. It is clear from the record that Mrs. Johann is and at all times involved in this matter has been a supervisor within the meaning of the Act and I so find.

Mrs. Johann denied that she had stated that she knew the two girls who had taken information out of the plant; and if she could prove it, she would have them fired. She testified that she said, when asked how the Union had gotten company sales figures, that they must have run their own tapes, because, if they had taken the company books out of the building, they could be fired. She denied the specific statement attributed to her. I discredit her in this regard. I believe that she indicated without saying that she knew who had furnished the Union with the figures; and I believe she stated that, if she could prove that Peterson and Hoover did so, she could have them fired. I believe that this constitutes a violation of the Act. Hoover and Peterson, in the normal course of their business, were aware of the sales of Respondent, not only on a day-to-day basis, but on a cumulative basis, because they dealt with these figures in their work. For them to use this knowledge in furtherance of the concerted and union activity in which they were engaging does not lose them the protection of the Act. For Respondent to threaten discharge for their use of this knowledge is violative of Section 8(a)(1). I find that Respondent violated Section 8(a)(1) by Mrs. Johann's remarks in this regard.

The General Counsel alleges that Mrs. Johann restrained and coerced employees by following Union adherents at the plant. This allegation is based on testimony by Mrs. Hamil that Mrs. Johann had stated to her that she would like to follow Betty Peterson all day long to see how long she could stay out of work, and see what she did do, because every time she saw her she was not doing much of anything. Mrs. Johann testified that she did not make the statements attributed to her, but that "I would have said 'it is amazing to me how Betty gets any work done, as much as she is away from the desk.'" And she might

have said this because "In many instances it was necessary for me to go from my downstairs office to the front room where Mrs. Peterson and Mrs. Hoover were on problems concerning accounts. I made as much as three or four trips on one problem trying to talk to one or the other, and there was never anyone there, or not never, but quite frequently. It took three or four trips to find either one of them." I believe that, in fact, Mrs. Peterson was away from her work a good bit of the time, but I believe that the description by Mrs. Johann of her and Mrs. Hoover's absences from their machines is hyperbolic in nature. I have no doubt that she commented to Mrs. Hamil that she would like to follow Betty Peterson some day and see where she goes, or what she does with her time, but I find no evidence on the record that she ever did, in fact, follow her. I believe she might have said that she had watched Mrs. Peterson one morning, as she might very well have done, and seen her circulating through the plant. I find no restraint or coercion of employees in Mrs. Johann's statement. I find insufficient evidence on the record that she, in fact, followed Mrs. Peterson in the plant for hours as the General Counsel alleges. I recommend that the complaint be dismissed with regard to this allegation.

Margaret Knox, who was employed by Respondent as a printer and was one of the very few employees in the plant who earned more than the minimum wage, formed a "committee" consisting of herself and five other employees, Doris Lincoln, Opal Lincoln, Lorraine Madison, Shirley Welder and Grace Clark, for the purpose of opposing the union organization. The six members of the committee all worked in different parts of the plant. They held four meetings in the plant during the course of their workday, all in the afternoon, usually around 2:30 p.m., and the meetings varied from 10 to 20 minutes each. Each

meeting was called by Miss Knox, who went around the plant and gathered the committee members together. Apparently no question was ever raised by any supervisor as to her authority to do this. She testified that she invited Mr. Sandahl to the meetings and he apparently attended some, if not all, of them. One of the manifestations of the committee was a meeting for all employees which was held on March 22 at the bank building in the town of Madrid. Miss Knox at first attempted to have the meeting held on the plant premises, but Sandahl declined to permit her to do so, stating that that would not be advisable, so she rented the bank room. She testified that she never recovered the rent from the Employer, and that it was solely her idea. Sometime prior to March 20, Miss Knox discussed with Mr. Sandahl the problem of getting a speaker at the meeting. Sandahl agreed to provide a speaker, supposedly to answer questions with regard to the union organization. Before the meeting Miss Knox and Shirley Welder typed up and reproduced a sheet containing questions to be asked at the meeting. Copies were made for all who came to the meeting.

On Monday, March 22, Miss Knox invited Johann and Rasmusen. Sandahl had already been invited, of course, and was bringing the guest speaker with him. About 25 people showed up, including Sandahl, Johann and Rasmusen. The guest speaker brought by Sandahl, who introduced himself as a neutral person, was James Rogers, the company attorney, a former employee of the National Labor Relations Board, now in private practice. No clear picture appears on the record of the discussion that took place at the meeting. Questions were asked. However, Miss Knox could testify only as to the answer to the question she asked which had to do with whether her job could be eliminated if the plant was organized. Miss Knox strongly denied recol-

lection of any questions having to do with wages, hours or working conditions, although it appears from the context of her testimony and that of others who were present that such questions were asked. Miss Knox displayed excellent recall in other fields, but with regard to what took place at the meeting, she was unable to recall most of the discussion.

The General Counsel contends that the meeting in the bank building was arranged by Respondent and constituted a violation of Section 8(a)(1). There is insufficient evidence on the record, as a whole, for me to find that Respondent caused or paid for the meeting. If there was a charge by Mr. Rogers presumably it was paid by Respondent. While Attorney Rogers may not have been candid with the employees in introducing himself as an impartial person, when he, in fact, represented the Employer, there is no substantial evidence on the record that he violated the statute in anything he said. I find that the General Counsel has not sustained his burden of proving that Respondent interfered with, restrained or coerced employees by the conduct of the bank meeting, and I recommend that the complaint be dismissed with regard thereto.

The day before the meeting, Mrs. Johann was invited by one of the members of the committee. She spoke about the meeting to the employees in her section, and told them that she thought it would be a good idea if they went to the meeting and asked them to do so as a personal favor to her. I know of no rules of the Board that render such activity by a supervisor unlawful under Section 8(a)(1) of the Act. An employer may tell his employees his opinion of a union. He may ask them to vote against the union, he may suggest one union over another in a two union situation, he may conduct meetings for employees in which he recommends against their voting for a

union or for any particular union, or against their union activity, as long as he does not threaten them with punishment for engaging in union activities, or promise them benefits from refraining therefrom.

It would appear to me that if an employer may conduct a meeting at which he asked employees not to accept a union, he does not commit an unfair labor practice if he asks employees to go to a meeting conducted by a third person with the same purpose, as long as nothing at that meeting constitutes coercive activity. There is no evidence of any coercive activities at the bank building meeting. I conclude, therefore, that there was nothing coercive in the action of Mrs. Johann in asking employees to go to that meeting as a favor to her. I recommend that this allegation be dismissed.

On the occasion referred to above when Betty Peterson was admonished not to come into the office before 8 o'clock, Richard Johann went to the girls to whom she had been talking and inquired of them whether Mrs. Peterson had been talking to them about the Union. They said she had not and that they were talking about birthday parties. According to the testimony of Mrs. Seemann, whom Mr. Johann did not put at the scene, Johann said that Mrs. Peterson had a perfect right to talk to the employees and to talk about the Union, but this sort of thing had to be done on their own time, and not on company time.

Johann's testimony was in substantial accord. Johann testified that there is no company rule against talking during working hours that has been reduced to writing, but that he has what he calls a no-nonsense rule that girls may not leave their work place and go over to talk to other girls. The inference is that his warning addressed to Mrs. Seemann and the other girls was given pursuant to this rule. It sounds fair enough if it were evenly applied, but

as the General Counsel demonstrated with the evidence in support of the allegation with regard to the bank meeting, the Employer not only permitted the antiunion committee to function freely during working hours (in fact, Sandahl attended one or more of the four meetings held among the six members of the committee during working hours), but the Respondent appears to take exception to similar expenditures of time on behalf of the Union. When the rule is enforced disparately it becomes violative. I find that by this disparate enforcement of the rule which is an extension of and consistent with the actions taken with regard to Peterson and Hoover requiring them not to come into the plant before 8 o'clock, Respondent was attempting to inhibit the efforts of the prounion employees within the plant, while at the same time it was assisting the efforts of the antiunion faction. This disparate treatment cannot help but have been noticeable to the employees, and certainly interfered with their exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Finally, the General Counsel contends that Respondent violated Section 8(a)(1) by an incident that occurred when Barbara Clemens, a supervisor, was asked by Patricia Downing, an employee who had been in a confidential relationship with Mrs. Clemens, why she had cooled toward her after Mrs. Downing advocated the Union. Mrs. Clemens answered that she was terribly disappointed because Mrs. Downing was following people on whom she would not have wiped her feet in the past. In consideration of the situation at Respondent's plant as it has been explicated above, and in consideration of the fact that Clemens and Downing were obviously close friends prior to the advent of the Union, I find no violation attributable to Respondent in this remark. Strong feelings frequently make for bit-

ter words, but in my opinion, this exchange was of a personal nature between the two women and contained no elements of coercion. I shall recommend that the complaint be dismissed with regard to this allegation.

Section 8(a)(3); the April 2 layoff

On April 2, nine girls were called into Sandahl's office where they were addressed by Richard Johann. They included Marjorie Huser, Doris Novy, Beverly Storey, Geneva Battani, Judy Allen, Marilyn Gohn, Jo Ellyn Rathbun, Evelyn Burke and Lois Geneser. Johann told the girls that they were good workers and he would give them a good recommendation for any place they could get a job, but that business was off, Respondent had lost one or two contracts, and had to cut down on expenses, so he was going to let them go. One of the employees, Geneser, asked whether the persons selected for layoff were selected on the basis of seniority, and Johann answered that they were. Geneser answered that he was getting rid of his best workers. The girls were handed slips of paper on which was typed:

> . . . as explained to you, business operating conditions require us to trim our work forces. I am sorry that as a part of this program, your employment will be terminated today, April 2, 1971.
>
> Richard G. Johann
> Vice President

Immediately prior to the discharge of the nine girls, Howard McCormick, a janitor, was called into the office by Johann, who discharged him with essentially the same message and gave him an identical paper.

The General Counsel contends that the discharge of nine girls and Howard McCormick violated Section 8(a)

(3) of the Act. The Respondent contends that the discharge was dictated by business conditions, and was an exercise of the Employer's business judgment.

The Respondent presented evidence to show that the situation in February looked as though business was decreasing. The Massey-Ferguson Company, for whom Respondent was engaged in a large scale operation, had a strike at its main plant and advised Respondent that it should cease certain mailing work for that customer for the duration of the strike. The Amvets, through which the Respondent secured between 2 and 2-1/2 percent of its business, was indicating to Respondent that it would cease doing business with it, and the Disabled American Veterans, through which Respondent secured some 10 percent of its business, had informed Respondent that it would not renew its contract, effective on May 1, 1971. In view of these considerations, Respondent contends, it determined that it had to cut back the expenses which were not in the direct line of selling. Accordingly, it determined to cut payroll in the departments which it considered to be indirect labor. Having chosen the departments which were to be cut, Respondent determined to discharge the employees with the least seniority, and did so.

In support of its position Respondent put in evidence the auditor's reports for Federal Prescription and Drivex for the end of their fiscal year, December 31, 1970, which contained a comparison with the year 1969.

The sales figures for Drivex for 1970 were $59,000 as against $73,000 for 1969. The net income (profits) was approximately $14,000 as against approximately $18,000 for the preceding year. For Federal Prescription the sales were $1,584,000 as against $1,484,000 in 1969, and the net income for both years was approximately the same, $25,000. The direct expenses rose between 1969 and 1970 by some

$26,000. These expenses include the pharmacists' salaries, raised a total of over $9,000, and increases in postage, shipping expenses and order preparation expenses. The indirect expenses rose by $32,000 from $106,000 to $138,000. The largest single cause of the rise was an increase of $13,000 in advertising and $8,000 in supplies for the selling and printing department. The general administrative expenses rose slightly, partly attributable to an increase in management salaries of $1,500. The total assets of Federal Prescription increased from $243,000 to $292,000 between 1969 and 1970.

The above figures scarcely present a dismal figure with regard to Federal Prescription. However, Respondent contends that in the early part of 1971, things went from bad to worse. The monthly audit sheets for January, February and March of 1970 and 1971 are in evidence. They show an increase in sales in 1971 over 1970 for that 3-month period of approximately 10.87 percent, that is to say, from $383,000 to $416,000. Other figures remain fairly comparable except that operating expenses increased substantially, leading to a net loss for the 3-month period of $15,000, as distinguished from a net profit in the year 1970 for that 3-month period of $240,000. It is notable that in both 1969 and 1970 large net losses appear early in the year. In February 1970, a loss of $8,000 wiped out the $6,000 profit of January, and was in its turn wiped out by $6,000 profit in March. In 1971 an initial loss of $12,689 was partially wiped out by a net profit in February and than augmented by a net loss of $6,700 in March. No explanation is given on the record for the extraordinary expenses in the early months of both years, and the term operating expenses is somewhat less than definitive. To the extent that a comparison of the payrolls is possible, it does not appear that the loss can be attributed to the hir-

ing of additional employees during these months. It may well be that the loss in 1971 was attributable to a campaign instituted by Respondent to increase its vitamin sales, which led to some 5,000 orders for vitamins, which may or may not have been sold at a loss. The record is not clear, but these sales certainly required personnel time. The record indicates that the sales figures for the vitamins are not part of the sales figures for Federal Prescription, but that the employees who worked on the orders were employees of Federal Prescription. Whether a separate accounting was made for wages and/or sales is not disclosed by the record. A comparison of the payrolls for the first 3 months of 1971 against the first 3 months of 1970 reveals that for the year 1970 an average of 66 employees worked an average of 32 hours a week, while in the year 1971 an average of 75 employees worked an average of 32 hours a week. It appears, therefore, that between 1970 and 1971 the work force increased by nine employees. There is no record to show in what department this increase is reflected. Surely some part of it is reflected in the Federal Vitamin Service campaign, inasmuch as at least for the period of 1 month the shipments of orders by Respondent must almost have doubled.

The increase in business of Federal Prescription by something over 10 percent for the first 3 months of 1971, compared to the first 3 months of 1970, would appear to warrant, and probably require, an increase in the number of employee-hours worked by Respondent's employees.[12] A comparison of the average weekly hours reveals that

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12. Because of the large number of employees of Respondent who worked less than a 40-hour week, a comparison of numbers of employees would not necessarily be valid. However, a comparison of employee-hours would appear valid in view of testimony of Respondent that casual employees, largely students, were used on a need basis.

there was an increase of about 12.5 percent in 1971 over 1970, somewhat more than the increase in business warranted. The difference, however, scarcely reflects any substantial "water" in the payroll.

The facts and figures presented by Respondent in support of its defense support it only weakly. President Craig Sandahl testified that the plan of campaign for Federal Vitamin Service and the rationale for commencing it in the first place, was to provide a source of new customers, both for the vitamins, a field which Respondent had been in to a small extent in the past, and for its other medicine inventory. A necessary device to generate continuing new business from the "one-short" advertising campaign of Federal Vitamin Service was the followup of the individual customers who purchased vitamins. This followup would normally take place in the month after the customer first ordered vitamins. The record reveals that the campaign reached its peak in February, with some 80 percent of the sales in the first month after the appearance of the advertisement and that by the end of the 3d month it had dropped off to almost nothing. Yet, at the time Respondent planned to commence its followup campaign to convert the one-shot vitamin customers into general customers, Respondent, because of the alleged expectation of reduced business, cut its work force significantly,[13] a much deeper cut than the change in business conditions would appear to warrant at that time.

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13. It cannot be determined from this record exactly what percentage of the work force was cut. In terms of employees it would appear that 12.5 percent of the employees roughly, that is to say, 10 out of 79 or 80 were cut. However, it appears that all of the girls who were cut were full-time employees. The only part-time employee cut was John McCormick. Inasmuch as the 79 or 80 employees included many part-time employees, it appears obvious that the cut in terms of employee-hours was greater than 12.5 percent, a much deeper cut than the change in business conditions would appear to warrant at that time.

Respondent argues that the loss of the Disabled American Veterans and Amvets contracts, and a strike at Massey-Ferguson required an immediate adjustment in the expenditure of man-hours. However, the DAV contract did not expire until May 1, 1971, and the 1971 figures for DAV were substantially higher than the 1970 figures had been, while the Amvets business, which had comprised less than 2-1/2 percent of Respondent's business in 1970, had in fact increased in 1971, both in totals and in percentiles although the new contract was under negotiation and no advertising had appeared for a period of several months. The strike at Massey-Ferguson, which did not take place until March 19, resulted in a cessation of only part of the Massey-Ferguson business and was indefinite in duration.

I view the reasons advanced by Respondent for the discharge of 10 employees as inconsistent and inadequate, but on the state of the record I cannot find that they are clearly false. It is not my province to substitute my judgment for Respondents in matters of its business. But the defense is so weakly supported that, although it does not give rise to a presumption that there has to have been another unacknowledged reason for the discharges, it nevertheless requires a close perusal of Respondent's motivation in effecting the discharges and gives rise to an inference which together with other evidence could support a finding that the discharges were for union activity as alleged.

Respondent contends that it had no knowledge of the union activities of many if not all of the 10 dischargees. I do not believe this. From the inception of union activity, Respondent's management actively sought information concerning the extent of success of the organizing activities. It was materially assisted in its search for this information by the activities of various employees, including

Charlotte Simons, who testified that she attended the meetings and made records of the persons in attendance at the meeting. She even went so far as to list the various candidates for elective office in the Union and tally the ballots by which they were elected. Although Mrs. Simons testified that she did not turn over or show her notes and listings to Respondent's officers after each of the meetings, she reported to President Sandahl in his office that she had attended the meetings. Other evidence reveals that she was seen entering Sandahl's office with a notepad in her hand similar to that on which she was seen to take notes at the union meeting.[14]

All but one of the dischargees were union adherents. There was direct evidence that at least eight of them were present at the union meeting of March 9 at which Mrs. Simons was seen taking notes.[15]

Respondent stated that it chose for the discharge the junior employees in each of the departments which were out of the line of direct order filling. One of the departments so affected was the promotion department from which Beverly Storey, Lois Geneser, Doris Novy, Judy Allen and Jo Ellyn Rathbun were cut. Clearly Judy Allen, whose hiring date was January 18, 1971, was the junior in this department. The next junior employee in that department was Jo Ellyn Rathbun. The third was Charlotte Simons who was not discharged but who had proved her value to the Employer in other respects, *supra*. Doris

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14. I do not credit Mrs. Simons' denial that she did not inform Sandahl who attended the meetings or what took place.

15. Two of the alleged discriminatees, Judy Allen and Lois Geneser, did not appear and testify. Mrs. Geneser, however, signed a union authorization card on March 9 on the date of the union meeting at which 34 cards were signed. Judy Allen does not appear to have signed an authorization card and there is no evidence concerning her in connection with the Union on the record.

Novy was next junior with Steve Hansen directly behind her. Of course, Steve Hansen was the son-in-law of vice president Johann and this may have affected his retention. Although Respondent's witnesses testified that he was accorded no privileges or position other than that accorded all rank-and-file employees, I find the contrary. Beverly Storey, who commenced work on September 23, 1969, was senior to both Steve Hansen and Charlotte Simons.

Three employees were laid off from the shipping department; Marilyn Gohn, Evelyn Burke and Geneva Battani, all junior employees. Additionally, Marjorie Huser was laid off from the customer correspondence department. Her job was solely cleaning out files, a job that had not been filled before she was hired and was not filled after her departure although a number of Respondent's witnesses testified to the constant need for cleaning out files because of their tendency to outgrow the space.

The 10th person was John McCormick who was a part-time janitor and junior to Weldon Soderstrum, another part-time janitor. Assuming the validity of Respondent's selection of departments in which to effect the layoffs, it appears that it followed the basis of seniority except for the fact that it skipped Steve Hansen and Charlotte Simons in the promotion department. That Steve Hansen was skipped should be no surprise. However, that Charlotte Simons was skipped would seem to require an explanation but none was forthcoming. The only distinguishing characteristic of Charlotte Simons that appears on the record was her loyalty to Respondent which led her to report directly to Mr. Sandahl on her fellow employees' union activities. Her retention thus would appear to contradict the testimony of Sandahl, Rasmusen and Johann that union adherence had nothing to do with the selection of employees for layoff.

There is no question that Respondent was bitterly opposed to the Union and took steps as I have set forth above in the discussion under Section 8(a)(1) to meet the union organization head on and attempt to break it up. Under all the circumstances set forth above, I conclude and I find that Respondent in fact laid off the 10 employees, as alleged, as a demonstration to its employees that it and it alone had the power to give them jobs or take them away. Judy Allen apparently did not engage in any union activity. There is no evidence that Respondent believed that she had. Although she was unquestionably the most junior employee in the promotion department and the third most junior employee in the plant. I conclude that she was terminated to support Respondent's defense that it selected employees on the basis of seniority. I conclude further that any selection of employees would have served Respondent's purpose in demonstrating its power. I conclude that because Respondent discharged the 10 named employees in order to discourage its employees' union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

Section 8(a)(3); The Poststrike Discharges

When Respondent's employees learned of the discharge of the 10 employees at the peak of the union campaign, a strike commenced the next morning. Approximately 35 employees joined the strike. Respondent continued to operate with its remaining employees, and as I pointed out above, an injunction was issued against mass picketing. Later, a group of employees were found guilty of contempt of court in the violation of the mass picketing order, and another group of employees were found guilty of contempt of court in that they engaged in following nonstriking employees away from the plant in automobiles in an ob-

vious attempt to dissuade them from continuing their employment. The Union offered to end the strike and requested immediate unconditional reinstatement of its members. After some weeks of deliberation, Respondent started sending out letters recalling some of the strikers, but sent letters to three employees, Terry Edwards, Helen McCormick and Betty Peterson, stating that because they had engaged in serious misconduct during the strike, they would not be considered for reemployment. These three ladies were among those found guilty of contempt in the automobile-following incidents.

With regard to Betty Peterson, Respondent adduced the evidence of Bill Coffin, an employee of another employer, who testified that Betty Peterson rode with him in his automobile and that they followed the car of an employee whom he did not identify for a space of time during the strike. He testified that the car he was following stopped at one time. After turning into a parking lot he stopped, thinking that they wanted to talk. The other car took off again and went back to the Employer's plant. Betty Peterson testified that she was in the car with Mr. Coffin, that they followed Charlotte Simons, that after they stopped following her they went back to the company parking lot. She drove around the block, stopping in front of the union headquarters where she climbed out of the car and yelled at the pickets, "they don't know what we're going to do next." Thereafter, she was cited for contempt and found guilty, and fined $25.

On another occasion, Terry Edwards was driving her car and Helen McCormick was riding with her; a third girl was in the car, not otherwise identified. On this occasion they followed Charlotte Simons, who returned to the plant and was followed out of the plant by Sandahl. They followed Mrs. Simons and Sandahl, while Mrs.

Simons delivered another employee to her home, attempted to shake off her followers and then drove to her home. Craig Sandahl testified that he took part in the following episode; that he drove immediately behind Mrs. Simons until Mrs. Edwards passed him, whereupon Mrs. Simons made a rapid 360 degree circle in a parking lot and pulled off the shoulder until he got behind her. Then the procession pulled out and went up to Mrs. Simons' house. When Mrs. Simons got out she was in tears. He walked with her to the door and the girls in the other car honked their horn and yelled "scab" and other words at her. The record contains the remarks of the judge who found these three ladies in contempt of the injunction, but no specific findings of what they were alleged to have done to earn their citations. Respondent refused to employ the three girls allegedly because they were engaged in automobile-following, which the court found to be a violation of the injunction.

The Board has frequently considered the question of reinstatement of strikers who follow nonstriking employees to their homes or from the plant. In the recent case, *Juniata Packing Company,* 182 NLRB 934, the Board found that a striker who followed such a strike replacement to his moonlighting job, and there assaulted him physically, was disqualified. But other strikers who rode with the striker who assaulted the replacement were not disqualified for reinstatement since the nature of their conduct was outweighed by the Employer's unlawful prestrike activity, which included discharges, threats and promises of benefits, just as in the instant case. In another case, *Southwestern Pipe, Inc.,* 179 NLRB 364, the Board found that two incidents where a striker followed a nonstriker's car from the plant and chased two nonstrikers leaving the plant through the back exit were insufficient to disqualify the

striker from reinstatement, although other incidents in which he had engaged, including hitting a nonstriker in the face and flicking a cigarette against the head of another after abusing and threatening nonstrikers, were sufficient to disqualify him from reinstatement. I do not believe that the incidents, as set forth in this case, involving Helen McCormick, and Terry Edwards are of so outrageous a nature that they render these two ladies unfit for further employment by Respondent, and I believe that their discharge by Respondent was violative of Section 8(a)(3) of the Act.

With regard to Betty Peterson, Respondent adduced additional evidence that on the first day of the strike in the company of Union Agent Danny Gettler, she accosted Eve Wisecup, who was crossing the picket line. Gettler asked in effect whether Mrs. Wisecup's son did not work at "Perry Pork," a plant represented by the Union. Wisecup said "pardon me," and Betty Peterson said in effect "yes, and he just may have an accident." The above is found in the testimony of Mrs. Wisecup. Gettler testified that the conversation took place, but, asked directly whether Mrs. Peterson said that Mrs. Wisecup's son "just may have an accident," answered that he did not remember that. Mrs. Peterson was not recalled in rebuttal of this testimony. I believe Mrs. Wisecup in this regard. I do not conceive that Mr. Gettler's failure to recall amounts to the denial that Peterson made the statement. While, as with Terry Edwards and Helen McCormick, I do not believe the car-following incident is sufficient to justify Respondent's refusal to reinstate Mrs. Peterson, I believe that the threat to Mrs. Wisecup with regard to her son is of such an aggravated nature that Mrs. Peterson may be denied reinstatement by Respondent. Accordingly, I recommend that the complaint be dismissed insofar as her discharge is alleged to be violative.

## VI. The Challenges

With the 8(a)(3) allegations disposed of, we may now consider the challenges, 10 of which depended on the determination of the 8(a)(3) allegations. The first issue that arises with regard to the challenges is the efficacy of the agreed-upon voting list, considered from the standpoint of whether it is dispositive, without more, of the eligibility issues herein. The voting list is in evidence. It is a typewritten list of 72 names prepared by Respondent and presented at the conference of April 20, at which the Stipulation for Certification Upon Consent Agreement was signed. Seven names were struck off the voting list. Before and after each strikeoff appear the initials of James Rogers, the attorney for Respondent, and Ben Detweiler, the International representative of the Union. Above his signature Rogers wrote "approved and agreed to 4/20/71." Above his signature Detweiler wrote "Okay, by Ben Detweiler." The list is headed "Federal Prescription Services, Inc., Employee List," and was described by Sandahl as the agreed-upon list arrived at on April 20, in Boone, Iowa, when the field examiner conducted the joint conference. Sandahl testified that the strikeouts were the result of a compromise to make a voting list in exchange for an early voting date. The names struck out were Barbara Clemens, Lucille Danks, Merritt Hansen, L. A. Johann, Gary Rasmusen, Eve Wisecup and Sheri L. Sandahl.

Evidence reveals that when the election was about to commence, the Union announced that it was going to challenge the vote of Karen Burke because the Union had learned that Mrs. Burke had left Respondent's employ. Respondent contended that this was not so, and apparently a falling out occurred, which resulted in Rasmusen telling several of the employees who had been agreed upon as

excluded that they could vote. As a result, Eve Wisecup, Sheri Sandahl, Gary Rasmusen, Lucille Danks and Merritt Hansen presented themselves at the polls and voted. They were all challenged by the Board agent because they were not on the list. Karen Burke, Marian Danks, Cathy Edwards, Pam Herrstrom, Leanna Lincoln, Theresa Madison and Jacqueline O'Donnell were challenged by the Union on the grounds that they were casual employees, and Vicki Polich was challenged on the grounds that she was no longer an employee.

The Board does not lightly permit the parties to determine the eligibility of voters in its elections. In *Norris-Thermador, supra,* the Board concluded that where the parties enter into a written and signed agreement, which expressly provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, and only that agreement, as a final determination of the eligibility issues treated therein, unless it is in part or in whole contrary to the act or established Board policy. In *Pyper Construction Company, supra,* the Board cited this decision with approval and rested an eligibility finding therein on such a list. In *Doctors' Hospital of Modesto, Inc.,* 183 NLRB No. 94, the Board followed the rule of *Norris-Thermador* but found no written stipulation of the agreement therein, so it included an employee whom the parties had agreed to exclude. In the instant case there is nothing in the stipulation for certification which indicates that there is an agreed-upon list stipulated to be final and binding upon the parties. While the language imposed upon the document by Attorney Rogers might lead one to seek further, the simple statement "okay" by Detweiler does not support such a finding. In any event I would not find that the document as it stands sufficiently reveals an intent on

the part of the parties to be bound within the meaning of the *Norris-Thermador* rule.

Furthermore, the *Norris-Thermador* rule has, as an adjunct, the proviso that the agreement of the parties shall not be contrary to the Act or established Board policy. The list, which was prepared by Respondent, reveals something less than complete candor on its part. The list bears the name of Lucille Danks, who, according to the testimony of Vice President Rasmusen, is an employee of Hood Hair Products, Inc., specifically excluded in the appropriate bargaining unit. The names of Barbara Clemens and L. A. Johann, both clearly supervisory, also appear on the list. For Respondent to assert at this time that these names were removed from the list only in order to satisfy the Union and make a *quid pro quo* for voting date, reveals that good faith was not a prevailing sentiment on its part at the joint conference. At any rate, I would find that the voting list would not satisfy the *Norris-Thermador* standards, even if it were accompanied by an adequate stipulation.

Having found that the voting list does not constitute a binding determination of eligibility, I shall deal individually with the challenges as follows:

*Lucille Danks*: The record reveals that Lucille Danks is the sole employee of Hood Hair Products. Hood Hair Products employees are specifically excluded by the terms of the Stipulation for Certification Upon Consent Agreement. Accordingly, Lucille Danks is not an eligible voter. The challenge to her ballot is sustained.

*Eve Wisecup*: The record reveals that Eve Wisecup is the private secretary to President Sandahl and does all of his clerical work. She is the person who handles, among other things, any correspondence relating to labor or em-

ployee relations and is privy to and has access to all records with reference thereto, I find that she is a confidential employee, ineligible to vote, and the challenge to her ballot is sustained.

*Karen Burke*: This employee was challenged on the basis that she was no longer an employee. The sole evidence with regard to her is that shortly prior to the voting period, her husband was detailed to another State, and she took a leave of absence of several weeks to accompany him. The company records reveal that she returned from the leave of absence and, in the week ending April 2, 1971, worked 43 hours. The next week she did not work. The week of April 16 she worked 45 hours. The week of April 23, 29 hours. She did not work again until the week ending May 14, during which she worked 22.5 hours, and the week ending May 28, she worked 6 hours. The record is inadequate to say that she was not still employed as of the date of the election, May 13. She was not called to testify at the hearing. I cannot find, on the basis of this record, that she was not an employee. Accordingly, the challenge to her ballot is overruled and the ballot may be opened and counted.

*Cathy Edwards*: Cathy Edwards is listed as an office employee and was challenged as a confidential employee. The evidence reveals that her main function was to count and list cash and checks. She was not a secretary, it does not appear that she ever typed letters or took dictation, and there is no evidence that she had available to her any records or correspondence dealing with employee or labor relations. I find that she was an eligible voter within the terms of the Stipulation for Certification, and I recommend that her ballot should be opened and counted.

*Theresa Madison*: Theresa Madison was challenged by the Union as a casual employee. The evidence reveals that she was a fulltime keypunch operator employed in Des Moines, Iowa, and that occasionally she helped Respondent out by working on a Saturday when additional keypunching was to be done. The record reveals that she worked a total of 46 hours in the year 1969, on 12 separate days, working from 1-2/3 to 7-1/3 hours a day. In the year 1970, she did not work at all until October 9. From October 9, 1970, through the end of that year she worked 57 hours, and between January 8 and April 2, she worked 68 hours. She has not worked since April 2. In the year 1971 she worked a total of 11 weeks. I find that Theresa Madison was a casual employee working irregularly on a need basis. The apparent regularity of her employment between October and April preceding the election is explainable by evidence adduced by Respondent that during that period of time a keypunch operator was needed because of a special project which was discontinued thereafter. I find that she is ineligible as a casual employee;[16] the challenged is sustained.

*Vicki Polich*: Vicki Polich was challenged by the Union contending that she was no longer an employee. The record reveals that Vicki Polich ceased work at the request of her father when the strike started, but with a determination to return after the strike. The record reveals that after the strike cooled down after the election she did in fact return to work and worked regularly on a full-time basis throughout the month of June. She is still an employee of Respondent. Clearly Miss Polich is in no different position than the strikers insofar as her employee status is concerned. Her testimony is that she informed her supervisor at all times that she was planning to return

16. *General Stencils, Inc.*, 178 NLRB 108.

to Respondent's employ. Accordingly she was an eligible voter and her ballot should be opened and counted.

Marian Danks, Pam Herrstrom, Leanna Lincoln and Jacqueline O'Donnell were all challenged by the Union on the ground that they were casual employees. The record reveals that all four of them are students in various schools around Iowa.

Generally speaking, the Board includes students in a bargaining unit if their "community of interest" coincides with that of the employees and if they work regular part time or full time. The key word appears to be regular. Respondent contends that its student employees are regularly employed, although they may not work at all during the school term or may work only an occasional Saturday during that time, because they are regularly scheduled in to work during the summer months and during Christmas and Easter holidays when the housewife employees of Respondent normally cease work. Thus the students have a certain continuity. This would put them in a classification, if one were to attempt to pigeonhole them, of regular seasonal part-time employees. The records furnished by Respondent would seem to bear out the regularity of their employee relationship. Respondent presented evidence that in the year 1969 Leanna Lincoln worked a total of 444 hours in 12 weeks, in 1970 a total of 467 hours in 12 weeks and in 1971, through June 25, a total of 77 hours in 6 weeks. In 1970 Marian Danks worked 16 weeks or a total of 541 hours, and in 1971, 9 weeks for a total of 201 hours. Jacqueline O'Donnell in 1970 worked 571 hours in 16 weeks, and 171 hours in 6 weeks of 1971. Pam Herrstrom worked 481 hours in 14 weeks in 1970 and in 1971 worked 78 hours in 3 weeks. Other records showing a breakdown of the periods of time worked reveal that in 1969 Leanna Lin-

coln, starting in the week of June 8, worked 4 weeks through the week of August 17 and not thereafter. In 1970, starting on June 5 she worked 4 weeks through August 21 and not thereafter, in the year 1971 she worked 18 hours in the week of February 19, 31-1/2 hours in the week of April 9, 3 hours in the week of April 16, 8 hours in the week of April 23 and 8 hours in each of the weeks of June 11 and 18, apparently she was not employed in the week of June 25 which is as far as the record revealing her employment goes. Jackie O'Donnell worked first in the year 1970, starting with 24 hours in the week of May 29, she worked 4 weeks through the week of August 21, then worked the week of Thanksgiving and the week before Christmas, in 1971 she worked the week before Easter, a half day in the week of April 9 and a day in the week of April 16 and commenced full-time employment on June 11. Marian Danks in 1970 worked 4 weeks from June through August 28 with the exception of 1 week, that of July 31; worked a week before Thanksgiving, 2 weeks during the Christmas holidays, a half day in the week of January 11, a week before Easter, a half day the week of April 16, and half day the week of April 23, a half day the week of May 13, 4 days the week of June 4 and full time thereafter. In 1970 Pam Herrstrom worked full time from June through August 28, except for the week of July 31; she worked 12 hours the week of December 25 and a full week between Christmas and New Year's; she worked 7 hours the week of April 16 and 32 hours the week of June 4; she is not shown to have worked thereafter.

The position of Respondent regarding these employees as regular seasonal part-time employees is surely tenable and the working record of at least three of the employees excluding Pam Herrstrom would appear to bear it out,

however, the testimony of President Sandahl casts considerable doubt on the validity of the position. Sandahl testified that these people were counted as part of the regular work people they would call in and if the Respondent needed them they would schedule them in to work, on the other hand sometimes Respondent would have need of the students and would call them and ask if they would be available to work on given weekends. Generally speaking they worked during times when school was not in session if the Employer needed them. "We didn't make jobs for them, either the job was there or it wasn't there, but they were scheduled in on that basis." I find with regard to these four employees that they were not regular employees in the sense in which the Board uses that term but were casual employees in that they were usually available to work when school was not in session, and were called to work when Respondent had need for them. There obviously were far more students available than there were jobs available in the summertime, so that in the event a student was not available for one reason or another during the summer another could be fitted into the slot. There is no indication that any of these students were taking courses related in any way to Respondent's work and, in fact, it appears that some of them were taking courses an end to which would put them into positions other than those offered by Respondent. I believe all four of these employees were casual employees within the Board's use of that term, and were not within the unit. The challenges to their ballots, accordingly, are sustained.

The three remaining employees are also students. They are Merritt Hansen, Gary Rasmusen and Sheri Sandahl. These were not on the list, and were challenged by the Board agents. Merritt Hansen is the daughter of

Richard Johann and the wife of Steve Hansen, whom I considered above. Gary Rasmusen is the son of Roland Rasmusen, vice president, and Sheri Sandahl is the daughter-in-law of President Craig Sandahl. All three presented themselves to vote at the suggestion of Rasmusen when the Union determined that it would challenge the students and Karen Burke. The three employees are all students. Gary Rasmusen worked 2 full weeks and 14 hours in a 3rd week during August, and worked 20 hours the week of Christmas, in the year 1970. In 1971 he worked partial weeks the week of January 3 and 10, and the full week of April 11. He worked 5 hours in the week of April 18, 30 hours in the week of May 30 and full time through June, July and August. Merritt Hansen worked part weeks in 1970. In the first 2 weeks in September and in the 5-week period commencing February 7 she worked about half time. She worked 7 hours the week of March 14, 6-1/2 the week of March 21, 9 hours the week of April 1, 23 hours the week of April 11, 14 hours the week of April 18. She worked sporadically, never more than 27 hours a week, between May and August 8 except that she worked the full week ending June 21.

According to the Company's records Sheri Sandahl never worked before the week of April 18, 1971, worked 31-1/2 hours that week, 38 hours the week of April 25, 39 hours the week of May 2, 19 hours the week of May 9, 40 hours the week of May 16, and does not appear to have worked for the Employer since.

The General Counsel contends that these three employees do not belong in the unit because of their relationship with the Employer; also because they are casual employees. They are obviously much more casual than the four students that I discussed above and without considering

their relationships, I do not believe they belong in the unit. It is notable that Sheri Sandahl never worked before the strike and worked only 4 full weeks during the strike. Respondent contends that none of the three have any special privileges as a result of their relationship with the owners of the Company. Presumably the rule that they are not expected to work unless Respondent has need for them applies to them as well as to the other students. I would gather from the fact that they were omitted from the list in the first place that Respondent agreed at that time that they were casual employees or that their relationships were such that they should not be included in the unit. It doesn't matter on which ground the challenges are sustained. I recommend that they be sustained on the ground that they are casual employees.

### Conclusions With Regard to Challenges

As I've discussed above, I recommend that the challenges to the ten employees laid off on April 2 be overruled. These employees are:

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|---|---|
| Judy Allen | Marjorie Huser |
| Geneva Battani | John McCormick |
| Evelyn Burke | Doris Novy |
| Marilyn Gohn | Jo Ellyn Rathbun |
| Lois Geneser | Beverly Storey |

In addition, I recommend that the challenges to the votes of the following persons be overruled: Karen Burke, Cathy Edwards, and Vicki Polich.

## VII. The Objections to the Election

The Union objected to the conduct of the election on the grounds that, because of the large number of challenges, the election process was turned into a state of

commotion and the employees were therefore not permitted to cast their votes under the laboratory conditions normally required by the Board. I know of no case where the Board has held that an extraordinarily large number of challenges is grounds for setting aside an election. There is no evidence on the record that the employees presenting themselves at the polls to vote were disturbed by the challenge procedure and the challenge procedure is clearly contemplated within the definition of the Board's "laboratory conditions." Indeed, I'm prepared to take administrative notice that there have been many cases of elections conducted, particularly under strike conditions, where all, or nearly all, of the employees who presented themselves at the polls were challenged. Nevertheless, the Board has certified the results of such elections. I recommend that the Union's objection be overruled.

The Board may properly consider evidence adduced in the hearing, discovered in the postelection investigation of activities of Respondent during the critical period, which is the period between the filing of the petition on March 22 and the holding of the election on May 13, to determine whether the election should be set aside, even though such was not raised by the objections filed to the election. Most of the violations of Section 8(a)(1) of the Act, found above, took place prior to the filing of the petition. Only the interrogation of employees by Johann on March 25, the threats of Mrs. Johann that she would discharge the employees who took data from the plant if she could prove that they had done so, and possibly some of the interrogation by Mrs. Johann of Diana Hamil, took place during the critical period. However, in addition to the 8(a)(1) activity, it is alleged, and I have found, that 10 employees were terminated on April 2 in violation of Section 8(a)(3) of the Act. That this action on the part

of Respondent would have an impact on employees in the exercise of their protected rights is clear. The Board has always found a violation of Section 8(a)(1) implicit in a violation of Section 8(a)(3). In the instant case no inference need be drawn, the impact was clearly demonstrated by the fact that the employees went on strike the following day to protest the discharges and the Union has at all times contended that the strike was an unfair labor practice strike. I recommend that the election be set aside on the evidence set forth above.

I conclude that in the circumstances of this case, with substantial coercive conduct by Respondent before the filing of the petition and additional coercive conduct after the filing of the petition, culminating in the discharge of 10 employees, the conduct is of such a substantial nature that it is improbable that its effects in employees' minds could be erased by the Board's normal remedial orders. Accordingly, assuming that the other elements of an 8(a)(5) violation are met herein, I believe that a bargaining order should issue.

## VIII. The 8(a)(5) Allegations

### A. *The Unit*

The Union demanded recognition in a unit consisting of all employees on March 12. The Employer declined recognition on March 17. Thereafter the parties stipulated that the following collective-bargaining unit is appropriate.

> All full-time and regular part-time employees of Federal Prescription Service, Inc., and Drivex Co. at their Madrid, Iowa, operation, including customer correspondence, follow-up, janitor, maintenance, Massey-Ferguson office, order preparation, printing and shipping, but excluding pharmacists, all employees of Hood

Hair Products, Inc., guards and supervisors as defined in the National Labor Relations Act, as amended. [The appropriateness of this unit is alleged in the complaint by the General Counsel and admitted by Respondent in its answer and I find that it is an appropriate collective-bargaining unit.]

The employees who voted in the election, as I have discussed above in the section of this Decision relating to the challenges, were not necessarily the employees in the unit as it is spelled out above. Using the employee list, furnished by Respondent at the joint conference on April 20, which contains 72 names, I have already dealt with the eligibility of 12, Barbara Clemens, Lucille Danks, Marian Danks, Merritt Hansen, Pam Herrstrom, L. A. Johann (Mrs. Richard Johann), Leanna Lincoln, Theresa Madison, Jacqueline O'Donnell, Gary Rasmusen, Eve Wisecup, and Sheri Sandahl, all of whom I have found not to be in the unit. Two persons appearing on the list, Ken and Ray Lansing, are contended by the Respondent to be maintenance men. Raymond Lansing took the witness stand and his testimony revealed that he and his brother are farmers who have been employed by Respondent doing construction and repair work in and around the plants over a period of several years. They work only when their farm work does not keep them busy. Accordingly, their employment is mostly in the wintertime. They are paid on an hourly basis and are paid for all supplies which they purchase for use in Respondent's work. They are also employed by Sandahl in other enterprises which he conducts and have occasionally done work for other persons not connected with the Respondent. They work whatever hours they choose and do not punch a clock although at the end of each week they turn in their own reports of their hours and are paid on the basis

of these reports. They do not report to work unless they have contracted to do specific jobs such as the installation of ceilings, the repair of floors, repair of plumbing, and the like. On at least one occasion, they assisted in unloading a truck; the only work connected with production that they apparently have engaged in. The rest of their time is spent on specific projects. Normally, Sandahl lays out the jobs he wishes them to perform. The pace at which they perform them, and the manner in which they work, is left to them although Sandahl generally inspects the job at regular intervals.

I conclude that the Lansing brothers are independent contractors and are not within the unit.

Respondent maintains what it calls the contract payroll for employees from whom no deductions are made. Most, if not all, of the employees on the contract payroll are paid $1.60 an hour with no deductions at all. The Lansings are customarily paid on this payroll as are certain casual employees, such as boys hired to shovel snow in the wintertime or to do other odd jobs. In addition, however, some of the students and some of the regular employees are placed on the contract payroll for short periods of time.

According to the testimony of Respondent's officers, employees are placed on the contract payroll only at their request. However, two employees testified that they were placed on the contract payroll without having requested it. Another employee, Howard McCormick, testified that he was on the contract payroll for the first week of his employment; thereafter, he was placed on the regular payroll. The employees on the contract payroll do, for the most part, exactly the same work as the employees on the regular payroll; no distinction can be made for unit

purposes based on an employee's position on the contract payroll.

Diane Konchar, Cheryl Herrstrom, Patrice Severson, Diane Battani and Gretchen Johann were students in the same position as Marian Danks, Pam Herrstrom, Leanna Lincoln, and Jacqueline O'Donnell, whom I have found above to be casual employees whose working habits were too irregular to warrant their inclusion in the unit. The five girls were not included in the employee list used at the joint conference on April 20, 1971, and approved by Attorney Rogers and Business Agent Detweiler. It would appear that Respondent did not take the position that these five students should be members of the unit until after the complaint issued. I conclude as I did with the students who appeared and voted that these five girls are not employed within the unit and should not be counted.

Steve Hansen, the son-in-law of Vice President Johann was found above to occupy an anomalous position with Respondent. I find that he is not appropriately part of the unit as a relative of management obviously occupying a special position. Although not supervisory in the normal sense of the word, Hansen has exercised authority over the employees. He is salaried; he does not punch a timeclock; and he otherwise appears to be favored as a result of his family situation. I shall exclude him from the unit also.

The demand was sent by the Union through the mail on March 12 and received on March 15. Mary Lee Madson left Respondent's employ on March 12 and Jill Peterson became an employee between the 12th and the 15th. I shall exclude Mary Lee Madson and include Jill Peterson in the unit inasmuch as the demand, having been made by mail, was not perfected in my opinion until it was received on March 15.

As a result of the considerations set forth above, it appears that on March 15, at the time the demand was received by the Respondent, Respondent had in the unit agreed to by the parties a total of 63 employees.[17]

B. *The Showing of Interest*

The General Counsel produced cards signed by 37 employees, one of whom was Mary Lee Madson whom I have excluded because she left the Respondent's employ on March 12. This leaves a total of 36 card signers who were employed on the key date, March 15.

Vicki Polich testified that she signed a card only because the Union's business agent, Gettler, told her that she wouldn't be able to vote unless she signed a union card. She testified that this was told her at the union meeting on March 16, 1971; that it was not said to her personally but was stated to the people in attendance at the meeting. Gettler denied making such a statement and other employees denied hearing such a statement made at the meeting. No corroboration was afforded by any witness called by the Respondent. I do not believe Miss Polich. I believe either that she misunderstood something Gettler said or that her testimony is colored by the animus against the Union which she displayed on the witness stand. While it is not dispositive of the representation issue, inasmuch as the Union clearly with or without her card has demonstrated its majority representation as of the time of the receipt of the demand, nevertheless I count her card. I find that at the time of the demand the Union represented

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17. A listing of the 63 employees appears attached hereto and marked "Appendix A."

a majority of the employees in the appropriate collective-bargaining unit.[18]

### Conclusions Regarding the Refusal to Bargain

I find above that the Respondent, after the filing of the petition, committed unfair labor practices which warrant setting aside the election in the event that the Union is not shown to have won it when the challenged ballots are opened and counted. I also find above that the course of conduct of Respondent, which included unfair labor practices committed before the filing of the petition, after the filing of the petition, before the election and the discharge of two union employees after the election, constitutes unfair labor practices which have a tendency to undermine the Union's majority strength and impedes the election process and renders it improbable that the Board's traditional remedies would insure a fair rerun election. Accordingly, I find in the words of the Supreme Court "that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order . . . ." (*Gissel, supra.*) I find Respondent's refusal to recognize and bargain with the Union in these circumstances to be in violation of the provisions of Section 8(a)(5) and (1) of the Act. I shall therefore recommend, in the event the election conducted pursuant to Case 18-RC-8603 does not result in the Union winning when the revised tally of ballots is issued, that it shall be vacated and set aside and the petition in said case be dismissed.

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18. Respondent challenges the cards of John McCormick and Rae Jean Todd who each signed two cards and identified them in their testimony. Respondent's challenge is based upon an intricate chain of inferences, unsupported by evidence and insufficient to counter the direct and apparently truthful testimony of the card signers. I find that both signed cards on March 9, the date the cards bear.

## IX. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

## X. The Remedy

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In view of my finding that Respondent unlawfully discharged Judy Allen, Geneva Battani, Evelyn Burke, Marilyn Udorvich Gohn, Lois Geneser, Marjorie Huser, John McCormick, Doris Novy, Jo Ellyn Rathbun, and Beverly Storey, I shall recommend that Respondent be ordered to offer each of them immediate and full reinstatement to his former job or, if that job is not available to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. I shall further recommend that each of them be made whole for any loss of earnings suffered by reason of his discharge, by paying each of them a sum of money equal to that which he would have earned as wages from the date he was terminated to the date of reinstatement, or a proper offer of reinstatement, as the case may be, less his net earnings during such periods. Backpay is to be computed on a quarterly basis in the manner established by *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent calculated according to the formula set forth in *Isis Plumbing and Heat-*

*ing Co.*, 138 NLRB 716. I also recommend that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to aid in analyzing and determining whatever backpay may be due. I have found in addition, the Respondent discriminatorily discharged Terry Edwards and Helen McCormick. However, the record reveals that Terry Edwards and Helen McCormick were on strike at the time of their discharges, and that the strike continues. Although this is an unfair labor practice strike, there is no showing that these two ladies would have returned to Respondent's employ if they had not been discharged. Accordingly, I shall recommend as to them that Respondent rescind the discharges of these two employees and mail them letters so stating, correcting its records insofar as these two employees are shown to be discharged.

The Respondent contends that it should not be required to reinstate Evelyn Burke, one of the employees it discharged on April 2, because of her misconduct during the strike. I have found that Helen McCormick and Terry Edwards, discharged for similar alleged misconduct, are the victims of discrimination by Respondent. As a result of that discharge, I find that the evidence of misconduct by Evelyn Burke is no different than that with regard to Helen McCormick and Terry Edwards. Accordingly, I reject Respondent's contention that the incident relating to Mrs. Burke is of such an outrageous nature as to render her unfit for further employment by Respondent.

Inasmuch as the alternatives set forth above provide either that the Union win the election, in which case Respondent must bargain with it, or that the election be set aside, and the bargaining order issued, it is my recommendation that, in order to save time, too much of which has already been spent on this matter, the challenged bal-

lots should not be counted, but the election should be set aside, without further ado, and the bargaining order issued. Respondent has not throughout this matter shown a willingness to comply with the terms of the Act and there is nothing in the record herein that would lead me to believe that it will hereafter be any more willing to recognize and bargain with the Union than it has been in the past. The unfair labor practices shown to have been committed are of such a nature that they warrant the immediate issuance of a bargaining order; the issuance of a decision and direction to open the ballots can at best lead only to the imposition of the duty to bargain if the Union prevails, and no bargaining order will at that time issue. While it is true that a certification provides certain benefits to the Union, I believe that in this case, an order to bargain will provide benefits exceeding those which the Union would gain by achieving certification through the election process. Accordingly, I shall recommend that the election be set aside, the petition for election be dismissed and that a bargaining order issue.

Respondent contends that an order to bargain is inappropriate because the Union engaged in a deliberate plan of intimidation against Respondent and the nonstriking employees. This contention was first raised at the hearing, at which time Respondent through counsel stated that it had evidence concerning (1) the following of cars, forcing them off the road on public highways; (2) mass picketing and (3) voicing of verbal threats. Counsel at that time could refer me to no authority that activities by the Union of such nature had ever been held to be so invidious that the Union should be barred from a bargaining order.

In its brief Respondent cites the Board's decisions in *Laura Modes Co.* (144 NLRB 1592) and *N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F.2d 829 (C.A. 2, 1968), in

support of its contentions. In *Laura Modes* the misconduct on which the Board rested its decision to require that the employees reaffirm their choice of the union in an election consisted of an unprovoked beating of one of the partners comprising the employer, and the "pushing around" of female office employees before the filing of a petition and a beating administered to another of the partners by four men during a subsequent strike. In the *United Minerals* case the court refused to enforce an order that the employer should bargain with a union which had over a period of time led a strike during which the owner was attacked and beaten so severely that he was hospitalized for several weeks and incapacitated for over 5 months and various male and female employees were physically assaulted and beaten by strikers.

Both of the cited cases go back to the *Fansteel* decision[19] and both deal, as did *Fansteel* with "unprovoked and irresponsible physical assaults."[20]

In the instant case the proffered evidence amounts to automobile following, mass picketing and a single verbal threat. No physical assault took place; there was neither physical nor property damage.[21]

The Board has issued bargaining orders in many cases where incidents such as those found here were shown to have taken place. Recently, in *World Carpets of New*

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19. *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939).

20. *Laura Modes, supra.*

21. Respondent somewhat hyperbolically refers to an "incendiary device" found by a nonstriking employee in her unlocked trailer. The proffered evidence consists of the employee's testimony that she entered her trailer when she returned home from work and smelled gas or fuel. She found her rug "soaked with oil" and an open book of matches and a cigarette butt on the floor. There is no evidence linking this with either the Union or the striking employees.

*York, Inc.*, 188 NLRB No. 10, in a supplemental decision after remand from the court of appeals (403 F.2d 408) the Board considered a case where there was similar following of cars of nonstrikers, threats of physical harm, brandishing of sticks or ball bats and two incidents of minor shoving of nonstrikers—in short a somewhat less innocuous situation than shown here and rejected the employer's contention that no bargaining order should issue. I believe that decision rules this. Accordingly I reject Respondent's contention.

The Union suggests that Respondent should be ordered to reimburse the Union under the rule enunciated in *Tiidee Products, Inc.*, 194 NLRB No. 198. I do not deem the refusal to bargain herein so "brazen" nor the litigation so "frivolous" that such an order is warranted. Accordingly I shall not so recommend.

## Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, and its Local P-1149, are each of them labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of Federal Prescription Service, Inc., and Drivex Co., at their Madrid, Iowa, operation including customer correspondence, follow-up, janitor, maintenance, Massey-Ferguson Office, Order preparation, printing and shipping, but excluding pharmacists, all employees of Hood Hair Products, Inc., guards and supervisors as defined in the National Labor Relations Act, as amended, constitute a unit appropri-

ate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been the exclusive representative of all employees in the aforesaid unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act, since March 15, 1971.

5. By failing and refusing to meet and bargain in good faith, on and after March 15, 1971, with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act, and has thus interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thus engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discharging Judy Allen, Evelyn Burke, Geneva Battani, Lois Geneser, Marilyn Udorvich Gohn, Marjorie Huser, John McCormick, Doris Novy, Jo Ellyn Rathbun, Beverly Storey, Terry Edwards and Helen McCormick, Respondent discouraged membership of its employees in Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its Local P-1149, by discrimination with regard to tenure of employment or terms and conditions of employment of the above-named persons.

7. By coercively interrogating its employees concerning their and other employees' concerted and union activities, by interfering with its employees' meetings in connection with the Union, by threatening that employees would be discharged for engaging in activities on behalf of the Union, by moving its employees so that they worked under

closer supervision, by restricting their movements in their work area in order to interfere with their concerted or union activities and by urging its employees to reject the Union and promising benefits to them if they did so, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not committed other unfair labor practices as set forth above.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

## ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating in any manner with respect to their tenure of employment, or any term or condition of employment, because they engaged in concerted activity or activity on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization.

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22. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(b) Failing and refusing to bargain collectively in good faith with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive bargaining representative of all its employees constituting the unit herein found to be appropriate for the purpose of collective bargaining.

(c) Interrogating employees in a manner violative of Section 8(a)(1) of the Act.

(d) Promising employees benefits or improvements of working conditions as an inducement to refrain from becoming or remaining a member of the above-named Union, or any other labor organization, or threatening employees with discharge for engaging in union activities.

(e) Changing working conditions of its employees and restricting them in their activities in the plant, for the purpose of interfering with their concerted or protected union activities.

(f) Attending meetings of its employees held for the purpose of engaging in concerted or union activities.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in any other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right might be affected by an agreement to require membership in a labor organization as a condition of employment as

authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting Disclosure Act of 1959.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Judy Allen, Evelyn Burke, Geneva Battani, Marilyn Udorvich Gohn, Lois Geneser, Marjorie Huser, John McCormick, Doris Novy, Beverly Storey and Jo Ellyn Rathbun, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges previously enjoyed by them, and make them whole for any losses of pay they may have suffered, by reason of Respondent's discrimination against them, with interest at the rate of 6 percent, as provided in the section above entitled "The Remedy."

(b) Notify Helen L. McCormick and Terry Edwards that they are not discharged and upon their application to return to Respondent's employ they will be employed in their former jobs or, if those jobs no longer exist, to substantially equivalent ones without prejudice to their seniority and other rights and privileges previously enjoyed by them.

(c) Upon request, recognize and bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive representative of all the employees in the bargaining unit described above and, if an understanding is reached, upon request embody such understanding in a signed agreement.

(d) Post at its plant in Madrid, Iowa, copies of the attached notice marked "Appendix B."[23] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith. [24]

IT IS FURTHER RECOMMENDED that the election held pursuant to Case 18-RC-8603 be set aside and the petition for election in said case be dismissed. It is further recommended that the allegations of the complaint not hereinabove found to be supported by the evidence be and they hereby are dismissed.

Dated at Washington, D.C., April 28, 1972.

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23. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

24. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

## APPENDIX A

Freda Adams
Dorothy Ahrens
Marabell Anthony
Judy Allen
Correne Barrett
Geneva Battani
Betty Bell
Linda Benson
Georgia Bozich
Bernardine Burke
Evelyn Burke
Shirley Burke
Nina Grace Clark
Bessie Davis
Pat Downing
Kathleen Edwards
Terry Edwards
Charlotte Fitch
Garnet Galetich
June Galetich
Lois Geneser
Angelina Gibbons
Nancy Gibbons
Mary Ann Good
Emma Grill
Diana Hamil
Doris Hite
Mildred Hoover
Peggy Hoover
Marjorie Huser
Sharon Kilzer
Margaret Knox
Dorothy Laird
Carolyn Larson
Doris Lincoln
Opal Lincoln
Carol Madison
Lorraine Madison
Helen McCormick
John McCormick
Juanita McCoy
Margaret Niemier
Doris Novy
Icil O'Connell
Betty Peterson
Jill Peterson
Bernice Plummer
Violate Poindexter
Vicki Polich
Gloria Rasmusen
Jo Ellyn Rathbun
Sally Roberts
Imogene Seemann
Olga Sherman
Charlotte Simons
Carol Snider
Wildon Soderstrum
Beverly Storey
Rae Jean Todd
Marilyn Udorvich (Gohn)
Shirley Welder
Betty Williams
Donna Winters

## APPENDIX B

### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all these things.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights.

WE WILL NOT coercively interrogate our employees concerning their or other employees' concerted or union activities.

WE WILL NOT discriminate against our employees by discharging them in order to discourage activities on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, or any other union.

WE WILL NOT promise our employees benefits if they reject the Union or threaten them with discharge for engaging in activities on behalf of the Union.

WE WILL bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive collective-bargaining representative of our employees in the unit spelled out below:

> All full-time and regular part-time employees of Federal Prescription Service, Inc., and Drivex Co., at their Madrid, Iowa, operation, including customer correspondence, follow-up, janitor, maintenance, Massey-Ferguson office, order preparation, printing and shipping, but excluding pharmacists, all employees of Hood Hair Products, Inc., guards and supervisors as defined in the National Labor Labor Relations Act, as amended.

WE WILL reinstate with backpay

| | |
|---|---|
| Judy Allen | Marjorie Huser |
| Geneva Battani | John McCormick |
| Marilyn Udorvich Gohn | Doris Novy |
| Lois Geneser | Lois Storey |
| Evelyn Burke | Jo Ellyn Rathbun |

WE WILL withdraw our action of discharge of Helen McCormick and Terry Edwards, and, on their request, reinstate them to their former jobs or, if

those jobs are no longer available, to other jobs of a like nature.

Federal Prescription Service, Inc.,
and Drivex Co.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-725-2611.

IN THE
DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR THE COUNTY OF BOONE

FEDERAL PRESCRIPTION SERVICE, INC.,
Plaintiff,

vs.

LOCAL UNION NO. 1149, etc., et al.,
Defendants.

**PARTIAL TRANSCRIPT OF PROCEEDINGS**

Boone, Boone County, Iowa

June 7, 1971

APPEARANCES:

For the plaintiff:

Mr. Phillips
Attorney at Law
Mr. Mahoney
Attorney at Law

For the defendants:

Mr. Hedberg
Attorney at Law

Boone, Iowa

June 7, 1971

THE COURT: There are things that both sides have said that the Court is in agreement with and there are things that both sides have said that the Court disagrees with.

The worst thing that has happened since this labor dispute started is the things that aren't in court here, the acts of terrorism that were committed by people who haven't been apprehended. It seems almost typical that when you get into a serious labor dispute there are a few people, always a handful of people, who sneak around in the night and cause some kind of destruction to the property of other people, somehow thinking it is going to accomplish some purpose. I think it would be naive to say that these acts of terrorism or violence are not related to the labor dispute and it also would be naive to say that some person or persons involved in the labor dispute are not most likely the perpetrators of these rather cowardly acts. These things are not here, today.

So, I have got to put out of my mind the fact that I detest the kind of conduct that was involved with the nails in the driveways and the nasty phone calls and the killing of the horse and apparent damage to a fence, and put the disposition of these cases of findings of contempt on the merits for the basis of the finding.

The second thing involved, so far as I am concerned, is that I am very much disturbed, and have been throughout these proceedings, that people would think that a Court is so naive as to accept some of the attempted explanations that were given of the two incidents. Judges weren't born yesterday anymore than the people who are unhappy with the company in this labor dispute. And when I listened to some of the tales that were told by some of the witnesses I felt that I was in the position, perhaps, talking about stories involving children, of the mother who has her kindergarten child come home and make some excuse about some difficulty at school. Some of these things are just fantastic; so that in terms of this Court trying to make everyone happy by simply recogniz-

ing that everyone has learned his lesson and everyone now may go on his way, I wonder really if that would accomplish the purpose that ought to be accomplished by this contempt proceeding, because I wonder, if there is the slap on the wrist or the lecture, if it is really going to mean anything. The important thing, so far as I am concerned, I have said before, is that when the Court in the interest of law and order, keeping peace in the community, enters an order, the order must be enforced and if this Court now should after having found people to have violated this order say that this is all right or this is permissible or now you have learned your lesson because you have been chastised, I don't think it would accomplish the full purpose of the provision for contempt, as a method of enforcement of the Court's order.

I said as much as I want to say before about the problem that is in the background of the difficulty. This is something that will be settled elsewhere and it is significant to me only that it is an explanation by way of background of some of the conduct that was involved in these two contempt proceedings.

Judge Hellwege's observation at the time the contempt order was entered was obviously based upon experience that he and most judges have had in labor disputes over the years as lawyers and then as judges. We find these situations where you have got strong, heated feelings resulting in incidents that involve injunctions, that include proceedings in Court and sometimes a labor dispute is settled and the disputes in Court are left hanging, the company and the people in dispute with the company frequently taking the position that their dispute is settled and, so, it is all over, so far as they are concerned; and sometimes they even attempt to negotiate the contempt violations as part of the settlement of a strike. Well,

we haven't been very happy with either the companies or the disputants with the companies in that kind of situation, because we are not concerned about their grievance. We don't want them attempting to settle our grievance, so far as our Court Order is concerned by thinking they can do so in settlement of their labor dispute, however praiseworthy the settlement of the labor dispute may be. So, neither side is going to bargain away the Court's right to enforce its Order.

I agree with the observations made by Mr. Phillips that there are various categorizations that the kind of conduct involved in each of these incidents would fall into and pretty well agree to the degree of seriousness. It seems to me that this incident in April involving the gathering of the group for picketing, which was pretended to be somehow spontaneous, is something that was more done out of an absence of thought than anything else, because it wasn't anything that was calculated to accomplish anything meaningful. It is fortunate there wasn't any violence. It is fortunate it didn't last long. Since it happened relatively early in the dispute, it is possible that there may have been some confusion among some of these people as to how they should conduct themselves.

One thing in this regard that should be made clear is that all of us are bound to follow the law, that is, to observe standards which are imposed on us as to our conduct. And just as we have got criminal statutes and ordinances that govern our conduct, when a Court enters an order it has the force of ordinance or statute with respect to our conduct and if there is any person who commits an offense, engages in an act which is a violation of a statute or ordinance or Court Order, this person is nevertheless bound to the construction of the statute, ordinance or order that is applicable, that is, the reason-

able construction. And if there is any question about it, certainly the union here is represented by competent counsel with considerable experience in matters involving the legalities of this kind of proceeding.

So, this claim of ignorance of the law or ignorance of the meaning of the order or ignorance of the kind of conduct that could be permitted and the kind of conduct that was permitted just doesn't hold water. It is too late to run to the lawyer after the conduct has happened, so far as this Court is concerned. If you have any confusion or question you have a responsibility to determine what your rights and obligations are before the conduct is engaged in.

As to the incidents that happened in May, I think these incidents were of a more serious nature. We had already gone through a contempt proceeding where this order was very much discussed with some of the people and some of the relatives of people involved who were involved in the earlier hearing. This whole question of this order not being known about or understood just is another one of these things that is virtually incredible because, obviously, one of the most important things in the household of any of these people during this dispute has been the progress with respect to the strike and the conduct of the strike in general. And to say that spouses or members of the family haven't exchanged ideas about this or information about this or been interested in what is going on is just plain silly. So that when we get into the month of May—and again something that apparently the Court was expected to believe was almost spontaneous occurred in a two-day period, most of the conduct occurring in one afternoon, happened after all of the background of the other experiences with the Court and with the dispute that had preceded it.

I agree with the observation of Mr. Mahoney with respect to the story that was told here by McCoy. Really, I don't know how much a fool one thinks a Court is in a situation like this telling such an incredible tale. And this to me is more serious than either pleading the Fifth Amendment, which I don't hold against the people who did, or not testifying, at all, or attempting to minimize one's participation in the incident. I have got to be aware that this was a situation where the employees involved were working, although they are called apparently scabs, as a derogatory term that they must bear during the time they are working during a labor dispute. These people were mostly women; young, middle-aged, and older ladies, certainly not about to provide any kind of physical threat to the strikers, people who apparently wanted to go on about their business and didn't agree that the strike was the way to accomplish whatever the strikers wanted to accomplish. But, these were women who don't have the same armor or the same armament that a man does.

The union leaders involved in this have been men. The relatives of strikers who have been involved in this have been pretty husky, physically able men. And the mere confrontation between the union leaders and the male relatives of strikers and the women who were attempting to work, itself is the kind of act or conduct which means a lot more in this kind of case than if the people who were trying to work at the plant were men themselves or people who were somehow equal to the kind of implications that were involved, particularly in this business of following people around in cars. I don't think anybody here is so lacking in ability to understand the English that we use in our Court Orders that they could believe that they were doing anything by following these folks around in cars, in light of the act of terrorism

that had occurred and in light of the dispute and in light of the disparity of the crowds of people in the cars, the nature of the incidents, themselves, the telephone calls, apparently anonymous, about the things that happened at one time or another here, that anyone could believe that these people would not by the conduct be intimidated and that this wasn't the sole and only purpose of the acts.

So, what it comes down to then is that most of Mr. Phillips' statements I think went to the fact that the Court was justified in finding that there was contempt here and I am convinced that those findings were justified and where there was any reasonable doubt, reasonable doubt was given and that is in the background. The question, as Mr. Hedberg puts it, then, is what ought to be done with the disposition of these cases to insure that those who were found in contempt will behave themselves as good citizens and will respect the mandates of this Court, its ordinances and statutes of this jurisdiction, and the purpose is not to punish for the sake of punishment. But if people need to feel the sting of the law in order to know that the law has a sting, then perhaps there is something to be said for the assessment of penalty.

One thing that I want to make clear before I pronounce any kind of sentence here is that I don't want the sentences to be given here to be construed as any kind of attitude by this Court of forgiveness for the conduct that was involved. I am putting a certain amount of credence in what Mr. Hedberg has said and some of you said when testifying as witnesses here as to some confusion or some expression of good intentions. I will have that much respect for those of you who expressed yourselves in that way on the basis that except for these incidents, so far as I know you have been good citizens of this county or of the state. And the sentences that are

imposed here are going to be with an intention to let you know what the Court believes your relative responsibilities were and are with respect to these incidents, in an effort to see that they don't happen or anything similar happen in the future whether this dispute is going on or not.

Does any of the defendants here present have any legal case to show why sentence should not now be pronounced in these cases?

(Sentences passed.)

UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil Action File No. 11-410-C-2

FEDERAL PRESCRIPTION SERVICE, INC.,
Plaintiff,

vs.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; it LOCAL P-1149, et al.,
Defendants.

## JUDGMENT

(Filed May 9, 1974)

This action came on for trial before the Court and a jury, Honorable William C. Hanson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and Memorandum and Order of the Court re the post-trial motions having been entered, the following judgment is hereby substituted in lieu of the Judgment filed March 12, 1974,

IT IS ORDERED AND ADJUDGED that the plaintiff, Federal Prescription Service, Inc., recover of the defendants, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and its Local P-1149, the sum of Eighteen Thousand, Eight Hundred Fifty-One Dollars and 95/100, ($18,851.95), with interest as provided by law;

. IT IS FURTHER ORDERED that each party shall bear its own costs in the above entitled case.

Dated at Des Moines, Iowa, this 9th day of May, 1974.

R. E. Longstaff
Clerk of Court
By /s/ Cathryn J. McCord
Deputy Clerk

SUPREME COURT, U. S.
FILED
OCT 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

**No. 74-346**

FEDERAL PRESCRIPTION SERVICE, INC. AND DRIVEX CO.,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF IN OPPOSITION FOR RESPONDENTS AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND LOCAL P-1149, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

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## OPINIONS BELOW.

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The Decision of the Administrative Law Judge (Petition, pp. A35-A118) and the Decision and Order of the National Labor Relations Board (Petition, pp. A19-A34) are reported

at 203 NLRB No. 145. The opinion of the Court of Appeals for the Eighth Circuit (Petition, pp. A5-A18)[1] is reported at 469 F. 2d 813.

Respondents Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and Local P-1149, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as "the Union"), were Intervenors and Cross-Petitioners in the review proceeding before the Court of Appeals for the Eighth Circuit, and were Charging Party and Petitioner, respectively, in the consolidated unfair labor practice and representation matters before the Administrative Law Judge and National Labor Relations Board.

## JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

1. References to the Court of Appeals opinion as reprinted in the appendix to the petition shall be "C.A., p. . . . ." Similarly the Decision and Order of the National Labor Relations Board shall be referred to as "N.L.R.B., p. . . . ," and the Decision of the Administrative Law Judge as "Ad.L.J., p. . . . ."

## QUESTIONS PRESENTED.

1. Whether the separate affirmative findings below of the Court of Appeals, National Labor Relations Board, and Administrative Law Judge as to the necessity of a bargaining order comply with the standards of this Court as set forth in *N.L.R.B.* v. *Gissel Packing Co.*?

2. Whether the Court of Appeals, National Labor Relations Board and Administrative Law Judge below dealt correctly with the allegations of employee misconduct resulting from Petitioner's illegal anti-Union campaign?

3. Whether the Administrative Law Judge's treatment of evidence with respect to alleged employee misconduct satisfied standards of administrative due process?

## STATUTES INVOLVED.

Pertinent provisions of the National Labor Relations Act, as amended by the Taft-Hartley Act of 1947, 29 U.S.C. § 141, *et seq.*, are adequately set forth in the Petition.

## STATEMENT OF THE CASE.

Petitioners Federal Prescription Service, Inc. and Drivex Co. (hereinafter referred to as "the Company") are mail order drug prescription companies located in Madrid, Iowa. Federal and Drivex are owned and operated by the same three men and are conceded to constitute a single entity for collective bargaining purposes.[2]

The Company's work force is composed principally of housewives and school girls working as regular full-time or regular part-time employees. At the time in question all employees received $1.60 an hour—the minimum permissible under federal law—with no paid vacations or paid holidays. The Company withheld no federal income tax, social security, or other deductions from the pay of many of these employees whom it denominated "contract" employees.

**Employee Organizing Efforts.**

On March 3, 1971 two employees, dissatisfied with their low wages and the Company president's refusal to consider any raises, drafted and circulated a petition requesting a raise of five cents per hour for older employees, plus paid vacations and holidays. The Company president immediately summoned a suspected originator of the petition into his office and interrogated her as to her responsibility (Ad.L.J., pp. A42-A48). This illegal interrogation was found to be an unfair labor prac-

2. A third corporation, Federal Vitamin Service, also located in Madrid, Iowa and owned and operated by the same three individuals, was also found to be included with the Company for collective bargaining purposes. Federal Vitamin Services, however, has no employees and is not named as a party in the proceedings below.

tice in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter referred to as the "Act").[3]

On March 5, 1971, the women employees met together after work across the street from the plant. The Company president immediately entered the meeting for the deliberate purpose of breaking it up, which he did. This interference and coercion with respect to their protected activity was found to be in violation of the Act (Ad.L.J., pp. A48-A50).

Following this meeting, the women for the first time contacted the Union, and an employee's meeting with Union representatives was scheduled for March 8, 1971 in the community room of the local fire station. Again, the Company president—this time accompanied by the vice-president—attempted to gain entrance to the meeting over the objection of the employees. This second attempt to interfere with and coerce the employees was also found to constitute a violation of the Act (Ad.L.J., pp. A50-A51).

Immediately following this meeting, the Company president changed the work hours, work stations, supervisors, and overtime possibilities of five employees, including the two women who drew up the March 3 petition, in order to eliminate any concerted activity on their part. Again, these actions were found to be an unfair labor practice in violation of Section 8(a)(1) of the Act (Ad.L.J., pp. A51-A57).

On March 15, 1971 the son-in-law of the Company vice-president, a salaried employee found to be acting as a Company spokesman, removed the telephone from the hook in an isolated area of the plant and called the employees there for a meeting at which he effectively promised that the employees' expectations would be fulfilled if they rejected the Union. This illegal interference with the Union organizational attempt was

3. Unless otherwise indicated, the unfair labor practices summarized herein were so found by the Administrative Law Judge, the National Labor Relations Board, and the Court of Appeals for the Eighth Circuit. Their findings are based on a hearing record of 1200 pages and are not now contested by Petitioner.

found to violate Section 8(a)(1) of the Act (Ad.L.J., pp. A59-A62).

Following these promises to the employees, the son-in-law importuned the employees to ask the Company president and vice-president to talk to them. The Company president met with the women and told them his hands were tied but asked for more time to work something out. The meeting lasted well beyond quitting time and the women were paid overtime for their attendance. This speech, set against the background of the earlier speech, was found to constitute an additional promise of benefit if the employees dropped the Union and an additional violation of the Act (Ad.L.J., pp. A59-A63).

The wife of the vice-president, a supervisor at the plant in her own right, was found to have engaged in continued interrogation of two employees as to Union activities. The interrogation concerned who was attending Union meetings, who had signed Union authorization cards, the personal feelings of individuals concerning the Union, the content of the different Union meetings, and the danger of job elimination upon unionization. These interrogations, without any assurance, were found to be an unfair labor practice under the Act (Ad.L.J., pp. A63-A69).

The wife of the vice-president was found to have committed a separate unfair labor practice in stating that if she could find out which employees were advising the Union of their personal knowledge of Company operations she could have them fired (Ad.L.J., pp. A65, A70).

Another unfair labor practice was found to have been committed by the Company's discriminatory enforcement of a so-called 'no-nonsense" rule. On many occasions Company officials monitored and dispersed in-plant employee discussions suspected of involving unionization. At the same time, anti-Union employees were permitted to hold meetings freely during work hours, some of which were even attended by the Company president (Ad.L.J., pp. A71-A75).

Evidence of additional unfair labor practices alleged to have occurred during this period of organization include:

1. Anti-Union and anti-organization statements by the Company president at meetings of employees called by him on Company premises on March 4 and March 10, 1971 (Ad.L.J.. pp. A57-A59);
2. The following of Union adherents around the plant by supervisory personnel (Ad.L.J., pp. A70-A71);
3. Introduction of the Company attorney by the Company president at an anti-Union meeting as a "neutral person" and former Board employee (Ad.L.J., pp. A71-A73);
4. An anti-Union employee took notes at Union meetings and reported directly to the office of the Company president the morning after each meeting (Ad.L.J., pp. A81-A82).

**The Union's Demand for Recognition.**

At the Union meeting of March 9, 1971, 35 employees signed authorization cards in favor of the Union. Another employee signed a card on March 15, 1971. A Union demand for recognition was received by the Company on March 15, 1971 and denied on or about March 17, 1971. The Board found that the collective bargaining unit consisted of 65 employees on March 15, 1971.

It is undisputed that on March 15, 1971, the date of receipt of the Union's demand for recognition, a majority of Company employees in the collective bargaining unit had signed valid Union authorization cards (Ad.L.J., pp. A103-A104).

**The Discriminatory Discharges and Unfair Labor Practice Strike.**

On April 2, 1961 the Company terminated ten employees, all but one of whom had signed the March 3 petition, had signed Union authorization cards, and had attended Union

meetings. The Administrative Law Judge found that the Company knew the dischargees to be Union adherents and that the employees were terminated as part of the Company's campaign "to meet the union organization head on and attempt to break it up" (Ad.L.J., p. A84). The National Labor Relations Board and the Court of Appeals confirmed the Judge's finding that the employees were discharged in order to discourage union activities and ordered them reinstated (N.L.R.B., pp. A20-A23; C.A., pp. A10-A13).

The following day a majority of the Company employees went on strike in protest against the discharge of the ten employees. The Company continued to operate the plant and obtained a state court injunction against mass picketing. On May 25, 1971, the employees through the Union offered to return to work unconditionally and to leave to the Board the processing of the unfair labor practice charges arising out of the April 2 discharges. On or about June 16, the Company responded by terminating three of the striking employees for alleged misconduct in connection with the strike.

The Administrative Law Judge found two of these three post-strike discharges to be in violation of Section 8(a)(3) and ordered the women reinstated (Ad.L.J., pp. A84-A87). The Board reviewed the matter and ordered all three reinstated (N.L.R.B., pp. A23-A26). The Court of Appeals found the failure to reinstate not to have violated the Act (C.A., pp. A13-A14).

**The Election.**

On April 20, 1971 the parties signed a stipulation for Certification Upon Consent Election. At the election 25 employees voted for the Union, 32 voted against the Union and 23 ballots were challenged, a number sufficient to affect the results of the election.

Of the 23 challenged ballots, 10 were cast by employees illegally terminated on April 2. The Administrative Law Judge

ruled that these should be counted and this order was affirmed by the Board and the Court of Appeals (Ad.L.J., pp. A84, A88; N.L.R.B., pp. A20-A23; C.A. pp. A10-A13). Of the remaining 13 challenged ballots, challenge to three were overruled by the Administrative Law Judge and this order was not disturbed by the Board or the Court of Appeals (Ad.L.J., pp. A90-A97). The remaining ten challenges, all of which were made by the Union, were upheld by the Administrative Law Judge, and confirmed by the Board and Court of Appeals.

**The Bargaining Order.**

The Administrative Law Judge, after an extended analysis of all of the matters described above, found: 1) that at the time of the demand the Union represented a majority of the employees in the appropriate collective bargaining unit (Ad.L.J., pp. A103-A104); 2) that the Company's course of conduct was a deliberate attempt to destroy the Union and included unfair labor practices both before and after the filing of the petition for an election and before and after the election itself (Ad.L.J., pp. A84, A104); 3) that these practices tended to undermine the Union's majority strength and impede the election (Ad.L.J., p. A104); 4) that the Company had not shown a willingness to comply with the Act, and nothing in the record would show a greater future willingness to recognize and bargain with the Union (Ad.L.J., p. A107); 5) that this deliberate course of conduct rendered it improbable that the Board's traditional remedies would insure a fair rerun election (Ad.L.J., p. A104).

Accordingly, pursuant to *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Administrative Law Judge found "that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order" (Ad.L.J., p. A104, quoting *Gissel, supra*), and recommended that the Company be ordered to recognize and bargain with the Union.

The National Labor Relations Board, upon a review of the entire record, upheld the findings of the Administrative Law

Judge, found the repeated violations of the Act to be of a "persuasive and aggravated character," and issued the recommended bargaining order (N.L.R.B., pp. A27-A28).

The Court of Appeals for the Eighth Circuit compared the record evidence to this Court's criteria in *Gissel, supra,* and found that the record supported a finding not only that the Union had represented a clear majority of the employees, but that the Company's course of conduct was of such a persuasive and aggravated character that a fair election was precluded and a bargaining order necessary.

## ARGUMENT.

### I.

### THE DECISION BELOW IS IN FULL ACCORD WITH N.L.R.B. v. GISSEL PACKING CO.

In *N.L.R.B.* v. *Gissell Packing Co.*, 395 U.S. 575 (1969) this Court held (395 U.S. at 610, 614-615):

> Remaining before us is the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside.
>
> * * * * *
>
> [T]he Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The requirements and standards of *Gissel* have been recognized and followed by each and every tribunal in this proceeding. As indicated in the Statement of the Case, *supra* p. 4, the Administrative Law Judge exhaustively examined the evidence before him and explicitly found that the "substantial coercive conduct" before and after the filing of the petition, evidenced by the finding of substantial repeated violations of Section 8(a)(1) of the Act, and highlighted by the illegal discharge of ten employees, "is of such a substantial nature that it is improbable that its effects in employees' minds could be

erased by the Board's normal remedial orders" (Ad. L.J., p. A99). The Administrative Law Judge further found that the Company's course of action includes unfair labor practices beginning on the first day of spontaneous employee organization and continuing until after the election "which have a tendency to undermine the Union's majority strength and impedes the election process and renders it improbable that the Board's traditional remedies would insure a fair rerun election" (Ad. L.J., p. A104).

The National Labor Relations Board reviewed the evidence and reached the same decision as the Administrative Law Judge (N.L.R.B., p. A27):

> Based on the entire record, including the Respondent's conduct violative of Section 8(a)(1) of the Act before and after the filing of the petition, and particularly the Respondent's discriminatory discharge of 10 employees after the strike in violation of Section 8(a)(3) of the Act, we find that the Respondent's violations of the Act not only precluded a fair election, but were of such a pervasive and aggravated character as to warrant the finding which we now make, that an order directing the Respondent to bargain with the Union is necessary to repair the unlawful effects. The aforementioned conduct has undermined the Union's majority and caused an election to be a less reliable guide to the employee's free choice than the signed authorization cards by which they designated the Union to represent them.

Finally, the Court of Appeals for the Eighth Circuit reached the same determination based upon its own separate analysis of the record (C.A., pp. A14-A15):

> On March 15, the date on which Employer received the Union's request for recognition, the Union held valid authorization cards signed by 36 employees of the 65 employees in the bargaining unit. The Board not only found that the Union held a clear majority, but determined that Employer's activities were of such a "pervasive and aggravated character" that a fair election was precluded and a

> bargaining order was necessary. This record supports that determination. The repeated interference with the employees' protected rights in violation of § 8(a)(1), and in particular the discharge of the ten employees in the face of the election justifies the Board's finding that a bargaining order should issue in this instance.

At each stage of this proceeding—before the Administrative Law Judge, the Labor Board, and the Court of Appeals—Petitioner has argued against a bargaining order. Each tribunal analyzed the evidence against the standards of *Gissel* and reached the same finding: the deliberate and repeated Company unfair labor practices were of such a pervasive and aggravated character that a fair election was precluded and a bargaining order necessary.

Recognizing its inability to fault the Board and the Court of Appeals for their full compliance with the tests of *Gissel*, Petitioner attempts to disparage the Eighth Circuit's review of Board bargaining orders by attacking its decision in *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (1971). In *Arbie*, the Eighth Circuit stated in dictum that where the record is silent with respect to the actual impact of the employer's unfair labor practices, the Court will defer to the Board's exercise of discretion and grant enforcement.

Whatever quarrel the Company may have with the *Arbie* approach, and Respondent believes it an appropriate method of administrative review,[4] it is absolutely irrelevant to the present case. In the instant case, the Court of Appeals affirmatively

4. It is relevant to point out that the Supreme Court in *Gissel* stated the same policy of deference to the Board's determination of such impact (395 U.S. at 612, n. 32):

> It is for the Board and not the courts, however, to make that determination [as to the necessity of a bargaining order], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 USC § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

found—like every other tribunal—that the record of repeated Section 8(a)(1) violations and illegal discharges supports and justifies a finding of coercive course of conduct precluding a fair election and necessitates a bargaining order.

Moreover, Petitioner's attempt to portray the Eighth Circuit as a mere rubber stamp for a Board bargaining order insults the record of that court. The Court of Appeals for the Eighth Circuit has in every review of a bargaining order given special scrutiny to the record before the Board and reversed the Board without hesitation when faced with a failure of proof as to the likely irremediable impact of the unfair labor practices on a rerun election. *Dawson Metal Products, Inc.* v. *N.L.R.B.*, 450 F. 2d 47 (8th Cir. 1971); *Fremont Newspapers, Inc.* v. *N.L.R.B.*, 436 F. 2d 665 (8th Cir. 1970); *N.L.R.B.* v. *Crystal Tire Co.*, 410 F. 2d 916 (8th Cir. 1969); *N.L.R.B.* v. *Arkansas Grain Corp.*, 390 F. 2d 824 (8th Cir. 1968); *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (8th Cir. 1971). See also *N.L.R.B.* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (8th Cir. 1965).

Finally, Petitioner speculates as to the unopened ballots of the twenty-three challenged voters, and contends that the possibility that the Union would have received as many votes at election in April as it had signed authorization cards in March shows that a fair election had been held. The argument is specious on its face. There is no evidence as to how many Union supporters were afraid to sign cards, nor is there any evidence as to the votes on the unopened challenged ballots. It is equally conceivable, based on the facts from which Petitioner speculates, that the Union would have received 60 votes on election day but for the Company's repeated unfair labor practice. Each tribunal below found that Petitioner's deliberately illegal policies were so aggravated and pervasive as to render a fair rerun election unlikely. Speculation as to unopened ballots in the first election cannot alter that finding. The decisions below are based on the evidence and in full conformance with this Court's decision in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

## II.

## THE COURT AND BOARD CORRECTLY EVALUATED ALLEGED EMPLOYEE MISCONDUCT.

Examination reveals Petitioner's bloody shirt of violence to be but a red herring. As described above, the Company deliberately engaged in a blatantly illegal campaign to destroy protected employee activity. This anti-Union campaign, begun at the first sign of spontaneous employee activity, continued throughout the period of employee organization, peaked in the illegal discharge of nine known Union adherents, and continued until after the Union election.

Against this proven record of unfettered illegal activity by the Company, the evidence of Union "violence" is minimal:

1. A single instance of mass picketing immediately following the illegal discharge of Union employees.
2. Two "car following" episodes, both occurring on a single day (J.A. pp. 223-233; 865-868).
3. An allegation of attempted damage to a trailer, which resulted in no damage and which the Administrative Law Judge, after receiving all of Petitioner's evidence, found to have been unconnected with either the Union or the striking employees (Ad.L.J., p. A108).
4. A single verbal threat by a woman on the picket line, on the day following the discharge of the Union adherents, which the Board found so insignificant as to order the women reinstated (N.L.R.B. pp. A23-A26).

That is *all* the evidence of "violence" which the Petitioner either introduced or offered for evidence in this matter. The Administrative Law Judge correctly categorized the extent of "Union violence" (Ad.L.J., p. A108):

> In the instant case the proffered evidence amounts to automobile following, mass picketing and a single verbal

threat. No physical assault took place; there was neither physical nor property damage.

None of these instances occurred during the period of Union organization; none of them occurred until after the Company's own illegal termination of employees suspected of supporting the union.

Contrary to the thrust of Petitioner's legal arguments, the policy of the Board and the courts is to refuse to issue bargaining orders, even if otherwise justified by the employer's unfair labor practice, where the union has used violence or other coercive organizing to obtain its authorization cards. See e.g., *N.L.R.B.* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829 (2nd Cir. 1968); *N.L.R.B.* v. *World Carpets of New York*, 463 F. 2d 57 (2nd Cir. 1972); *Laura Modes Co.*, 144 NLRB 1592 (1963); *Aircrafts Mantel and Fireplace Co.*, 174 NLRB 737 (1969); *Allou Distributors, Inc.*, 201 NLRB 47 (1973).

On the other hand, the Board with Court approval has issued bargaining orders, under the principles of *Gissel*, where the employer's unfair labor practices are found to be deliberate, pervasive and aggravated and the employee misconduct so limited and infrequent as not to resemble a course of conduct. Such a ruling has been held particularly justified where the episodes of misconduct followed receipt of the authorization cards, and could not there have been related to any organization coercion or to any company doubt as to the union's representative status. See *Cascade Corp.* v. *N.L.R.B.*, 466 F. 2d 748, 753 (6th Cir. 1972); *Pacific Abrasive Supply Co.*, 182 NLRB No. 48 (1970); *Daniel A. Donovan*, 206 NLRB 108 (1973).

To hold that the limited reaction of a few individuals—without any damage to person or property—to a deliberately illegal anti-Union campaign by the Company should bar the Union from the bargaining order found necessary to remedy

the Company's course of conduct would only urge the Company to greater excesses and reward it for its illegal actions. A company determined to prevent unionization at any cost could continue illegally to discharge, interrogate, discipline and otherwise coerce until some individual employee grew frustrated at the continued illegality and committed an isolated act of violence. The remedy of a fair rerun election would be eliminated, the union's legal majority dissipated, and the union forbidden to receive the bargaining order to which it is entitled. All incentive for such a company to forbear from illegal activity would be removed. The present policy of the courts and the Board, reflected in the present case, is closely attuned with this Court's decision in *N.L.R.B.* v. *Fanstell Metallurgical Corp.*, 306 U.S. 240 (1939), and its progeny and ought to be disturbed.

## III.

## PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner's claimed denial of due process is equally hyperbolic. Petitioner's evidence as to the alleged attempted damage to the trailer (J.A., pp. 740-745), car following incidents (J.A. 425-436, 486-494, 709-721, 730-733, 739-740, 865-867, 912-915), mass picketing (J.A. 457-459, 705-707), and an isolated verbal threat (J.A. 707-708, 726-727) was all admitted into the record and considered by the Administrative Law Judge. Evidence as to alleged employee misconduct in connection with the thirteen Section 8(a)(3) charges was admitted in full (J.A. p. 701). Evidence as to misconduct by employees not discharged by the Company was made by offers of proof following the admission by counsel for Petitioner that the most severe misconduct was the alleged car-following (J.A. pp. 701-703).

No grounds exist for Petitioner's claimed denial of due process.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for certiorari should be denied.

Respectfully submitted,

IRVING M. KING,
RUSSELL WOODY,
THOMAS D. ALLISON,
*Counsel for Respondents.*

COTTON, WATT, JONES, KING & BOWLUS,
Suite 4750—One IBM Plaza,
Chicago, Illinois 60611,
*Of Counsel.*

October 20, 1974.

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# In the Supreme Court of the United States

October Term, 1974

FEDERAL PRESCRIPTION SERVICE, INC. AND DRUGS, CO., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Peter G. Nash
General Counsel
National Labor Relations Board
Washington, D.C. 20570

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC. AND DRIVEX CO., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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The judgment of the court of appeals (App. A, *infra*, pp. 3-6) was entered on June 6, 1974.[1] The 90-day period for filing a petition for a writ of certiorari (see 28 U.S.C. 2101(c)) expired on September 4, 1974; petitioner did not

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[1]Petitioner states (Pet. 2) that the judgment was entered on July 2, 1974. That, however, was merely the date on which the court of appeals issued a certified copy of the judgment (App. C, *infra*, pp. 9-10) pursuant to Rule 41(a), Fed. R. App. P. (see App. B, *infra*, p. 7-8).

obtain an extension of time for petitioning. The petition was filed out of time on September 26, 1974. Accordingly, the Court has no jurisdiction to entertain it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board.*

NOVEMBER 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1362

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO., PETITIONERS,

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., INTERVENORS.

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No. 73-1420

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS,

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

JUDGMENT

BEFORE: Van Oosterhout, Senior Circuit Judge, Lay and Stephenson, Circuit Judges.

THESE CONSOLIDATED CAUSES came on to be heard upon the petitions of Federal Prescription Service, Inc., and Drivex Co., and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al., to review an order of the National Labor Relations Board issued on May 31, 1973, against Petitioner, Federal Prescription Service, Inc., and Drivex Co., its officers, agents,

successors, and assigns, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 14, 1974, and has considered the briefs and transcript of record filed in these causes. On May 1, 1974, the Court being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Federal Prescription Service, Inc., and Drivex Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating in any manner with respect to their tenure of employment, or any term of condition of employment, because they engaged in concerted activity or activity on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization.

(b) Failing and refusing to bargain collectively in good faith with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive bargaining representative of all its employees constituting the unit herein found to be appropriate for the purpose of collective bargaining.

(c) Interrogating employees in a manner violative of Section 8(a)(1) of the National Labor Relations Act. (hereinafter called the Act)

(d) Promising employees benefits or improvements of working conditions as an inducement to refrain from becoming or remaining a member of the above-named Union, or any other labor organization, or threatening employees with discharge for engaging in union activities.

(e) Changing working conditions of its employees and restricting them in their activities in the plant, for the purpose of interfering with their concerted or protected union activities.

(f) Attending meetings of its employees held for the purpose of engaging in concerted or union activities.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in any other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Evelyn Burke, Geneva Battani, Marilyn Udorvich Cohn, Lois Geneser, Marjorie Nuser, John McCormick, Doris Novy, Beverly Storey and Jo Ellya Rathbun, priority reemployment in their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges previously enjoyed by them, and make them whole for any losses of pay they may have suffered, by reason of Respondent's discrimination against them, with interest at the rate of 6 percent.

(b) Upon request, recognize and bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1149, as the exclusive representative of all the employees in the bargaining unit described above and, if an understanding is reached, upon request embody such understanding in a signed agreement.

(c) Post at its plant in Madrid, Iowa, copies of the attached notice marked "Appendix".[1] Copies of said notice, on forms provided by the Regional Director for Region 18, (Minneapolis, Minnesota) after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

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Dated: June 6, 1974

Costs taxed in favor of Labor Board:

| | |
|---|---|
| Costs of printing 25 copies of Labor Board's brief: | $334.30 |
| Total costs of Labor Board for recovery from Federal Prescription Service, Inc.: | $334.30 |

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[1The appendix to the judgment, which merely sets forth the notice the Board order required to be posted, is omitted.]

**APPENDIX B**

June 6, 1974

Messrs. Irving King
and Russell Woody
Suite 4750, One IBM Plaza
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Messrs. Paul S. Kuelthau
and Ronald K. Fisher
611 Olive Street
St. Louis, Missouri

Messrs. George J. Zazas
R.E. Highfield & G.H. Baker
1313 Merchants Bank Building
Indianapolis, Indiana 47204

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Robert J. Wilson
Regional Director, Region 18
118 South Fourth Street
Minneapolis, Minnesota 55401

Re: Nos. 73-1362/1420. Federal Prescription Service et al v. N.L.R.B.

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No. 74-346

IN THE

# Supreme Court of the United States

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FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *et al.*,
*Intervenors.*

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## PETITIONERS' REPLY

---

GEO. STEPHEN LEONARD
1225 Connecticut Avenue, N.W.
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*Attorney for Petitioners*

*Of Counsel:*

LEONARD, CLAMMER & FLUES
1225 Connecticut Avenue, N.W.
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IN THE

# Supreme Court of the United States

No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *et al.*,
*Intervenors.*

## PETITIONERS' REPLY

### I

### Reply to Solicitor General

With all due respect, the Solicitor General falls into error by calculating his filing time from the entry of a preliminary form of judgment. The same question was resolved with the Eighth Circuit Clerk by the office of the Clerk of this Court when this petition was filed and also by counsel (see appended letter of the Clerk which the government brief omitted.)

Finality is the key to unraveling the conceded ambiguity of two letters from the Clerk referring to an entry of "judgment". As held in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 427 (1969)

> "[A] 'judgment for our purposes is final when the issues are adjudged' *and settled with finality* . . ." (emphasis added)

And in *C.I.R.* v. *Bedford's Estate*, 325 U.S. 283, 287 n.3 (1945) it was held that where local rules left the question of finality in doubt, certiorari time would be counted from the official entry of the "Order for Mandate" issued 21 days after the Court's ruling.*

Here the Solicitor General glosses over the fact that the first Clerk's letter of "entry" was, as stated on its face, a form of judgment *"as proposed by petitioner"* (the unsuccessful party) following a significant modification on rehearing and under Local Rule 2(c) remained subject to the Court's power to "stay or recall" and, under 2(d) could be "entered for the court by the clerk" only "if unopposed after due notice to all interested parties".

The settlement of the form of judgment by submission to the parties—particularly where the Board is a party—is hardly a novel proceeding. Here the Board and the Union were being granted 21 days to submit alternative proposals. It was only after they left petitioners' proposed form unopposed that judgment was finally entered and certified on July 2 as stated in the Clerk's letter of that date.

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* Note 1 of the Solicitor General's brief misquotes Rule 41(a) F.R.A.P. which fixes mandate time after rehearing denial at 7 days unless otherwise ordered.

## II

### Reply to Union Brief

The Union's selective recitation on facts can be responded to in proper detail when and if a hearing on the merits is ordered. For the preliminary certiorari question, the factual summary by the Eighth Circuit is a sufficient rebuttal.

1. Equally, whether or not the bargaining unit was properly redefined into a retroactive card majority is not the problem in the petition. The certiorari issue assumes a card majority and asks whether the Board has power or discretion to set aside an election and order *Gissel* bargaining in the absence of any actual—or reasonably inferable—findings on the anti-elective effect of the employers' conduct. In other words, whether the Court of Appeals here avoided its statutory review burden by according conclusive weight to the Board's silence on the point. True, the *Arbie* rule quoted in the petition was as the Union says, dictum in that case, but not when the principle was used as the *ratio decidendi* in the present decision.

2. The Union appears to agree that bargaining should not be ordered with a Union convicted of organizing violence, and asserts that this is presently the common doctrine of both the Board and the Courts. But the Union's citations, *World Carpets* and *United Minerals*, show the situation to be the contrary, the split occurring on the point of how much violence should be condoned.

The Union then seeks to divorce its own behavior from what it calls "*Employee* Misconduct", "*employee* incidents", or "the limited reaction of a few individuals" and even points to the examiner's conclusion—after the exclusion of the employers' proof—that there was no "damage to person or property". One would search the

*Union* brief in vain to find that the *Union* itself was convicted and fined, that a jury found the *Union* caused over $18,000 in direct property damage to the employers, that the *Union* ordered its stewards brought into Madrid to lead the strikers in the "acts of terrorism" noted by the Court of Appeals.

3. As the Union's third point, it is said that the evidence of violence did go into the record at the hearing. Some did of course, where it concerned the validity of the employers' discharge of three members of the bargaining unit for their attacks on non-strikers—but even as to these individuals, the Court of Appeals had to reverse their exoneration by the Board. What was left out of the record? Spikes, stoned windows, slashed tires, shooting, the noose and gibbet displayed by the Union, the frightening off of non-strikers and contractors, etc. The emphasis here is that despite the exclusion of such evidence at the hearing itself, both the examiner and the Board found it desirable nevertheless to make findings on the extent of the violence—but limited to the items allowed in evidence. It is that reliance on a half-told story that emphasizes the character of the due process denial for which the employers seek relief before this Court.

Respectfully submitted,

GEO. STEPHEN LEONARD
*Attorney for Petitioners*

LEONARD, CLAMMER & FLUES
1225 Connecticut Ave., N.W.
Washington, D.C. 20036

November 21, 1974

## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Louis, Mo. 63101

ROBERT C. TUCKER, CLERK

October 2, 1974

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: No. 73-1362. Federal Prescription Service, Inc., et al. v. N.L.R.B.

No. 73-1420. Amalgamated Meat Cutters & Butcher Workmen, etc., et al. v. N.L.R.B.

Dear Mr. Leonard:

After our telephone conversation of September 30, I have discussed the situation about which we spoke with the panel of Judges to whom these cases were submitted.

The panel has directed me to advise you that it feels this Court is without jurisdiction to enter any order at this time relative to the date of judgment. The Court has directed me to state to you that you may use copies of any of the letters sent to you by this office in any appropriate motions filed by you in the Supreme Court.

I have today received a notice of filing petition for writ of certiorari indicating that the petition was filed in 73-1362, as well as 73-1420, on September 26, 1974, and now bears number 74-346 in the Supreme Court. Ap-

Dear Sirs:

We have today entered judgment in the above cases as proposed by petitioner. Certified copies of the judgment will be sent to the parties at the expiration of twenty-one days as provided by our Rules.

Very truly yours,

Robert C. Tucker
Clerk

dw

**APPENDIX C**

July 2, 1974

Messrs. Irving King
and Russell Woody
Suite 4750, One IBM Plaza
Chicago, Illinois 60611

Messrs. Paul S. Kuelthau
and Ronald K. Fisher
611 Olive Street
St. Louis, Missouri

Messrs. George J. Zazas
R.E. Highfield & G.H. Baker
1313 Merchants Bank Bldg.
Indianapolis, Indiana 47204

Mr. Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

Mr. George S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Robert J. Wilson
Regional Director, Region 18
110 South Fourth St.
Minneapolis, Minnesota 55401

Re: No. 73-1362 & 73-1420. Fed. Prescription Ser., et al
v. NLRB

Dear Sirs:

Enclosed herewith to each of you is copy of certified copy of judgment of this Court entered today in the above case.[1]

Very truly yours,

Robert C. Tucker,
Clerk

eh
enc.

[1The copy of the judgment is set forth in Appendix A, *supra*.]

parently, the filing question has been satisfactorily resolved.

Very truly yours,

/s/ Robert C. Tucker
ROBERT C. TUCKER
Clerk

RCT/mm

cc: Messrs. Irving King and Russell Woody

Messrs. Paul S. Kuelthau and Ronald K. Fisher

Messrs. George J. Zazas, R.E. Highfield & G. H. Baker

Mr. Elliott Moore, Deputy Assoc. General Counsel

Mr. Robert J. Wilson, Reg. Dir.